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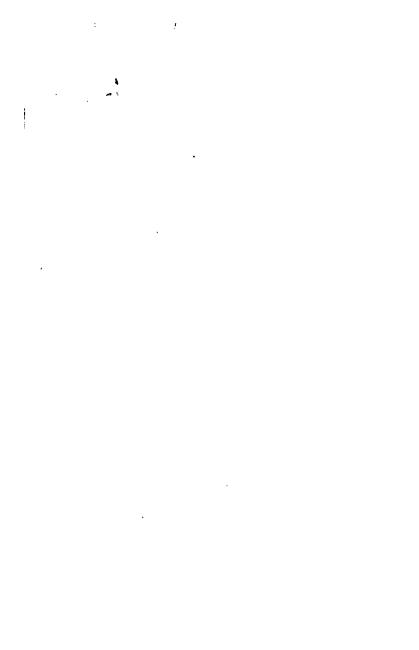
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ESSENTIALS OF THE LAW.

Vot. III.

Feb. 20.1890

COMPRISING THE ESSENTIAL PARTS

OF

POLLOCK ON TORTS;

WILLIAMS ON REAL PROPERTY;

AND BEST ON EVIDENCE.

FOR THE USE OF

STUDENTS AT LAW.

BY

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## PREFACE.

This volume forms the third and last of the series, the first of which was published five years ago. The plan adopted in the first two has been retained in this, and the works abridged are well and favorably known to the profession.

The additional experience of five years, and the favorable reception accorded the volumes already published, confirm the editor in the opinion expressed in the Preface to Volume I. as to the usefulness of such books when carefully prepared and judiciously used. It is hoped that the present volume will not be found less useful than its predecessors.

MARSHALL D. EWELL.

Union College of Law, Chicago, March 16, 1888.



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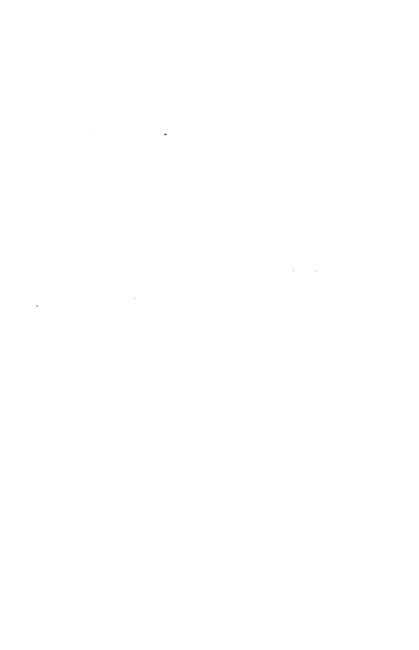
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# POLLOCK ON TORTS.

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# POLLOCK ON TORTS.

# THE LAW OF TORTS.

# BOOK I.

### CHAPTER I.

THE NATURE OF TORT IN GENERAL.

A tort is an act or omission giving rise, in virtue of the common-law jurisdiction of the Court, to a civil remedy which is not an action of contract.

Torts are to be distinguished on the one hand from contracts and on the other from criminal offences, though there are various acts which may give rise to both a civil action of tort and to a criminal prosecution, or to the one or the other at the injured party's option.

The civil wrongs for which remedies are provided by the common law of England, or by statutes creating new rights of action under the same jurisdiction, may be classified as follows:—

### GROUP A.

## Personal Wrongs.

- Wrongs affecting safety and freedom of the person:
   Assault, battery, false imprisonment.
- Wrongs affecting personal relations in the family: Seduction, enticing away of servants.
- 3. Wrongs affecting reputation: Slander and libel.
- Wrongs affecting estate generally:
   Deceit, slander of title.
   Malicious prosecution, conspiracy.

### GROUP B.

### Wrongs to Property.

- 1. Trespass: (a) to land.
  - (b) to goods.

Conversion and unnamed wrongs ejusdem generis.

Disturbance of easements, &c.

Interference with rights analogous to property, such as private franchises, patents, copyrights.

### GROUP C.

Wrongs to Person, Estate, and Property generally.

- 1. Nuisance.
- 2. Negligence.
- Breach of absolute duties specially attached to the occupation of fixed property, to the ownership and custody of dangerous things, and to the exercise of certain public callings.

The groups above shown have been formed simply with reference to the effects of the wrongful act or omission. But they appear, on further examination, to have certain distinctive characters with reference to the nature of the act or omission itself. In Group A., generally speaking, the wrong is wilful or wanton. Either the act is intended to do harm, or, being an act evidently likely to cause harm, it is done with reckless indifference to what may befall by reason of it.

In Group B. this element is at first sight absent, or at any rate indifferent. The intention to violate another's rights, or even the knowledge that one is violating them, is not in English law necessary to constitute the wrong of trespass as regards either land or goods, or of conversion as regards goods. Again, it matters not whether actual harm is done. "By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing." Nor is this all; for dealing with another man's goods without lawful authority, but under the honest and even reasonable belief that the dealing is lawful, may be an actionable wrong not-

withstanding the innocence of the mistake. Good intentions will not afford an excuse. In one word, the duty which the law of England enforces is an absolute duty not to meddle without lawful authority with land or goods that belong to others. And the same principle applies to rights which, though not exactly property, are analogous to it. There are exceptions, but the burden of proof lies on those who claim their benefit.

In Group C. the acts or omissions complained of have a kind of intermediate character. They are not, as a rule, wilfully or wantonly harmful; but neither are they morally indifferent, save in a few extreme cases under the third head. The party has for his own purposes done acts, or brought about a state of things, or brought other people into a situation, or taken on himself the conduct of an operation, which a prudent man in his place would know to be attended with certain risks.

There are cases of this class in which liability cannot be avoided, even by proof that the utmost diligence in the way of precaution has in fact been used, and yet the party liable has done nothing which the law condemns. Such is the case of the landowner who keeps on his land an artificial reservoir of water, if the reservoir bursts and floods the lands of his neighbors. Except in these cases the liability springs from some shortcoming in the care and caution to which, taking human affairs according to the common knowledge and experience of mankind, we deem ourselves entitled at the hands of our fellow-men.

Disregarding certain anomalies, the normal idea of tort may be summed up somewhat as follows:—

**Definition.** Tort is an act or omission (not being merely the breach of a duty arising out of a personal relation, or undertaken by contract) which is related to harm suffered by a determinate person in the following ways:—

- (a) It may be an act which, without lawful justification or excuse, is intended by the agent to cause harm, and does cause the harm complained of.
- (b) It may be an act in itself contrary to law, or an omission of specific legal duty, which causes harm not intended by the person so acting or omitting.

- (c) It may be an act or omission causing harm which the person so acting or omitting did not intend to cause, but might and should with due diligence have foreseen and prevented.
- (d) It may, in special cases, consist merely in not avoiding or preventing harm which the party was bound, absolutely or within limits, to avoid or prevent.

A special duty of this kind may be (i) absolute, (ii) limited to answering for harm which is assignable to negligence.

In some positions a man becomes an insurer to the public against a certain risk, in others he warrants only that all has been done for safety that reasonable care can do.

Connected in principle with these special liabilities, but running through the whole subject, and of constant occurrence in almost every division of it, is the rule that a master is answerable for the acts and defaults of his servants in the course of their employment.

### CHAPTER II.

#### PRINCIPLES OF LIABILITY.

There was a want of generality in early law. Law began not with authentic general principles, but with enumeration of particular remedies. There was no law of contracts in the modern lawyer's sense, only a list of certain kinds of agreements which might be enforced. Neither was there any law of delicts, but only a list of certain kinds of injury which had certain penalties assigned to them. Thus in the Anglo-Saxon laws we find minute assessments of the compensation due for hurts to every member of the human body, but there is no general prohibition of personal violence; and a like state of things appears in the fragments of the Twelve Tables. Whatever agreements were outside the specified forms were incapable of enforcement; whatever injuries were not in the table of compensation must go witbout legal redress.

In modern law, on the other hand, there exists a general duty not to do harm. The three main heads of duty with which the law of torts is concerned—namely, to abstain from wilful injury, to respect the property of others, and to use due diligence to avoid causing harm to others—are all alike of a comprehensive nature.

The commission of an act specifically forbidden by law, or the omission or failure to perform any duty specifically imposed by law, is generally equivalent to an act done with intent to cause wrongful injury. The old-fashioned distinction between mala prohibita and mala in se is long since exploded.

Many public duties are wholly created by special statutes. In such cases it is not a universal proposition that a breach of the duty confers a private right of action on any and every person who suffers particular damage from it. The extent of the liabilities incident to a statutory duty must be ascertained from the scope and terms of the statute itself.

The duty to respect proprietary rights is an absolute one. See post.

Duties of diligence. What is due care and caution under given circumstances will be worked out in the special treatment of negligence. Generally speaking, the standard of duty is fixed by reference to what we should expect in the like case from a man of ordinary sense, knowledge, and prudence. Moreover, if the party has taken in hand the conduct of anything requiring special skill and knowledge, we require of him a competent measure of the skill and knowledge usually found in persons who undertake such matters. Whoever takes on himself to exercise a craft holds himself out as possessing at least the common skill of that craft, and is answerable accordingly. If he fails, it is no excuse that he did the best he, being unskilled, actually could. He must be reasonably skilled at his peril.

An exception to this principle arises where in emergency, and to avoid imminent risk, the conduct of something generally entrusted to skilled persons is taken by an unskilled person.

Liability in relation to consequences of act or default. When complaint is made that one person has caused harm to another, the first question is whether his act was really the

cause of that harm in a sense upon which the law can take action. Liability must be founded on an act which is the "immediate cause" of harm or of injury to a right. Again, there may have been an undoubted wrong, but it may be doubted how much of the harm that ensues is related to the wrongful act as its "immediate cause," and therefore is to be counted in estimating the wrong-doer's liability. The distinction of proximate from remote consequences is needful first to ascertain whether there is any liability at all, and then, if it is established that wrong has been committed, to settle the footing on which compensation for the wrong is to be awarded.

In cases of tort the primary question of liability itself often depends on the nearness or remoteness of the harm complained of. Except where we have an absolute duty and an act which manifestly violates it, no clear line can be drawn between the rule of liability and the rule of compensation. The measure of damages, which appears at first sight to belong to the law of remedies more than of "antecedent rights," constantly involves, in the field of torts, points that are in truth of the very substance of the law.

The meaning of the term "immediate cause" is not capable of perfect or general definition. For the purpose of civil liability, those consequences, and those only, are deemed "immediate," "proximate," or "natural and probable," which a person of average competence and knowledge, being in the like case with the person whose conduct is complained of, and having the like opportunities of observation, might be expected to foresee as likely to follow upon such conduct. This is only where the particular consequence is not known to have been intended or foreseen by the actor. If proof of that be forthcoming, whether the consequence was "immediate" or not does not matter.

In the case of wilful wrong-doing we have an act intended to do harm, and harm done by it. In such case liability may extend to some consequences not intended. Thus, in the case of Scott v. Shepherd, Shepherd throws a lighted squib into a

<sup>1</sup> Scott v. Shepherd, 2 W. Bl. 892; and in 1 Sm. L. C.

building full of people. It falls near a person who, by an instant and natural act of self-protection, casts it from him. A third person again does the same. In this third flight the squib meets with Scott, strikes him in the face, and explodes, destroying the sight of one eye. Shepherd neither threw the squib at Scott, nor intended such grave harm to any one; but he is none the less liable to Scott.

This principle is commonly expressed in the maxim that "a man is presumed to intend the natural consequences of his acts."

The doctrine of "natural and probable consequence" is most clearly illustrated in the law of negligence. For there the substance of the wrong itself is failure to act with due foresight; it has been defined as "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." A reasonable man can be guided only by a reasonable estimate of probabilities. If in a particular case (not being within certain special and more stringent rules) the harm complained of is not such as a reasonable man in the defendant's place should have foreseen as likely to happen, there is no wrong and no liability.

### CHAPTER III.

### PERSONS AFFECTED BY TORTS.

## 1. - Limitations of Personal Capacity.

Generally speaking, in the law of tort there is no limit to personal capacity either in becoming liable for civil injuries, or in the power of obtaining redress for them. It seems on principle that where a particular intention, knowledge, or state

See this principle illustrated in the cases of Vandenburgh v. Truax, 4 Den. 464; Guille v. Swan, 19 Johns. 381; Glover v. London, &c. Railway Co., L. R. 3 Q. B. 25.

of mind in the person charged as a wrong-doer is an element, as it sometimes is, in constituting the alleged wrong, the age and mental capacity of the person may and should be taken into account (along with other relevant circumstances) in order to ascertain as a fact whether that intention, knowledge, or state of mind was present. But in every case it would be a question of fact, and no exception to the general rule would be established or propounded.

There exists a partial exception, however, in the case of alien enemies, and apparent exceptions as to infants and married women. An alien enemy cannot sue in his own right in any English court. Nor is the operation of the Statute of Limitation suspended, it seems, by the personal disability. An infant cannot be made liable for what is in truth a breach of contract by framing the action ex delicto. You cannot convert a contract into a tort to enable you to sue an infant. And the principle goes to this extent, that no action lies against an infant for a fraud whereby he has induced a person to contract with him, such as a false statement that he is of full age. But where an infant commits a wrong of which a contract, or the obtaining of something under a contract, is the occasion, but only the occasion, he is liable.

An infant cannot take advantage of his own fraud: that is, he may be compelled to specific restitution, where that is possible, of anything he has obtained by deceit, nor can he hold other persons liable for acts done on the faith of his false statement, which would have been duly done if the statement had been true.

A married woman was by the common law incapable of binding herself by contract, and therefore, like an infant, she could not be made liable as for a wrong in an action for deceit or the like, when this would have in substance amounted to making her liable on a contract. In other cases of wrong she was not under any disability, nor had she any immunity; but she had to sue and be sued jointly with her husband.

As to corporations, personal injuries cannot be inflicted upon them. It was long supposed that a corporation also cannot be liable for personal wrongs. But this is really part of the larger

<sup>&</sup>lt;sup>1</sup> Jennings v. Rundall, 8 T. R. 335.

question of the liability of principals and employers for the conduct of persons employed by them. In that connection we recur to the matter further on.

Where bodies of persons, incorporated or not, are intrusted with the management and maintenance of works, or the performance of other duties of a public nature, they are in their corporate or quasi-corporate capacity responsible for the proper conduct of their undertakings no less than if they were private owners: and this whether they derive any profit from the undertaking or not.

## 2. - Effect of a Party's Death.

Effect of death of either party. The common law maxim is actio personalis moritur cum persona, or the right of action for tort is put an end to by the death of either party, even if an action has been commenced in his lifetime. Causes of action on a contract are quite as much "personal" in the technical sense, but, with the exception of promises of marriage, and (it seems) injuries to the person by negligent performance of a contract, the maxim does not apply to these. In cases of tort not falling within statutory exceptions, the estate of the person wronged has no claim, and that of the wrong-doer is not liable.

The rule has even been pushed to this extent, that the death of a human being cannot be a cause of action in a civil Court for a person not claiming through or representing the person killed, who in the case of an injury short of death would have been entitled to sue. A master can sue for injuries done to his servant by a wrongful act or neglect, whereby the service of the servant is lost to the master. But if the injury causes the servant's death, it is held that the master's right to compensation is gone. <sup>1</sup>

Exceptions. The first amendment was made as long ago as 1330, by the statute 4 Ed. 3, c. 7, of which the English version runs thus:—

Item, whereas in times past executors have not had actions for a trespass done to their testators, as of the goods and chattels of the same testators carried away in their life, and so such trespasses

<sup>&</sup>lt;sup>1</sup> Osborn v. Gillett (1873) L. R. S Ex. 88, diss. Bramwell B.

have hitherto remained unpunished; it is enacted that the executors in such cases shall have an action against the trespassers to recover damages in like manner as they, whose executors they be, should have had if they were in life.

The right was expressly extended to executors of executors by 25 Ed. 3, st. 5, c. 5, and was construed to extend to administrators. It was held not to include injuries to the person or to the testator's freehold.

Nothing in these statutes affects the case of a personal injury causing death, for which, according to the maxim, there is no remedy at all. Where the cause of action is in substance an injury to the person, an action by personal representatives cannot be admitted on the ground of damage to the personal estate by reason thereof, such as expenses of medical attendance, etc.; the original wrong itself, not only its consequences, must be an injury to p operty.

The hardship of the common-law rule in the case of railway accidents brought about the passing of Lord Campbell's Act (9 & 10 Vict. c. 93, A.D. 1846), which, instead of abolishing the barbarous rule complained of, confers a right of action on the personal representatives of a person whose death has been caused by a wrongful act, neglect, or default such that if death had not ensued, that person might have maintained an action; but the right conferred is not for the benefit of the personal estate, but "for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused."

Under this statute it has been decided that some appreciable pecuniary loss to the beneficiaries must be shown; they cannot maintain an action for nominal damages, nor recover what is called solatium in respect of the bodily hurt and suffering of the deceased or their own affliction; they must show "a reasonable expectation of pecuniary benefit, as of right or otherwise," had the deceased remained alive. But a legal right to receive benefit from him need not be shown.

The interests conferred by the Act on the several beneficiaries are distinct. The cause of action under the statute is so far the same as that which the person killed would have had, had he lived, that

<sup>&</sup>lt;sup>1</sup> See also stat. 3 & 4 Will. 4, c. 42 (A.D. 1833).

if a person who ultimately dies of injuries caused by wrongful act or neglect has accepted satisfaction for them in his lifetime, an action under Lord Campbell's Act is not afterwards maintainable.

In Scotland, the surviving kindred are entitled by the common law to compensation in these cases, not only to the extent of actual damage but by way of solatium. In the United States there exist almost everywhere statutes generally similar to Lord Campbell's Act; but they differ considerably in details from that Act and from one another. The tendency seems to be to confer on the survivors, both in legislation and in judicial construction, larger rights than in England.

Where property, or the proceeds or value of property belonging to another, have been appropriated by the deceased person and added to his own estate or moneys, inasmuch as the action brought by the true owner, in whatever form, is in substance to recover property, the action does not die with the person, but the property or the proceeds or value which, in the lifetime of the wrong-doer, could have been recovered from him, can be traced after his death to his assets (by suing the personal representatives) "and recaptured by the rightful owner there." But this rule is limited to the recovery of specific acquisitions or their value. It does not include the recovery of damages, as such, for a wrong, though the wrong may have increased the wrong-doer's estate in the sense of being useful to him or saving him expense.

### 3. - Liability for the Torts of Agents and Servants,

Whoever commits a wrong is liable for it himself. It is no excuse that he was acting, as an agent or servant, on behalf and for the benefit of another. But that other may well be also liable; and in many cases a man is held answerable for wrongs not committed by himself. The rules of general application in this kind are those concerning the liability of a principal for his agent, and of a master for his servant.

Under certain conditions responsibility goes farther, and a man may have to answer for wrongs which, as regards the immediate cause of the damage, are not those of either his agents or his servants. Thus we have cases where a man is subject to a positive duty, and is held liable for failure to perform it. Special duties created by statute, as conditions attached to the grant of exceptional rights or otherwise, afford the chief examples of this kind. Here the liability attaches, irrespective of any question of agency or personal negligence, if and when the conditions imposed by the legislature are not satisfied.

There occur likewise, though as an exception, duties of this kind imposed by the common law. Such are the duties of common carriers, of owners of dangerous animals, or other things involving, by their nature or position, special risk of harm to their neighbors; and such, to a limited extent, is the duty of occupiers of fixed property to have it in reasonably safe condition and repair.

The degrees of responsibility may be thus arranged, beginning with the mildest:—

- For one's self and specifically authorized agents (this holds always).
- (ii) For servants or agents generally (limited to course of employment).
- (iii) For both servants and independent contractors (duties as to safe repair, etc.).
- (iv) For everything but vis major (exceptional: some cases of special risk, and, anomalously, certain public occupations).

Apart from the cases of exceptional duty, where the responsibility is in the nature of insurance or warranty, a man may be liable for another's wrong—

- (1) As having authorized or ratified that particular wrong:
- (2) As standing to the other person in a relation making him answerable for wrongs committed by that person in virtue of their relation, though not specifically authorized.

The former head presents little or no difficulty. The latter includes considerable difficulties of principle, and is often complicated with troublesome questions of fact.

It scarce needs authority to show that a man is liable for wrongful acts which have been done according to his express command or request, or which, having been done on his account and for his benefit, he has adopted as his own.

This is not the less so because the person employed to do an unlawful act may be employed as an "independent contractor," so that, supposing it lawful, the employer would not be liable for his negligence about doing it.

A point of importance to be noted in this connection is that only such acts bind a principal by subsequent ratification as were done at the time on the principal's behalf. What is done by the immediate actor on his own account cannot be effectually adopted by another, neither can an act done in the name and on behalf of Peter be ratified either for gain or for loss by John.

The more general rule governing the other and more difficult branch of the subject was thus expressed by Willes, J.: "The master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved."

1. Who is a servant. A master is one who not only prescribes to the workman the end of his work, but directs, or at any moment may direct the means also, or, as it has been put, "retains the power of controlling the work;" and he who does work on those terms is in law a servant for whose acts, neglects, and defaults, to the extent to be specified, the master is liable.

An independent contractor is one who undertakes to produce a given result, but so that in the actual execution of the work he is not under the order or control of the person for whom he does it, and may use his own discretion in things not specified beforehand. For the acts or omissions of such a one about the performance of his undertaking his employer is not liable to strangers.

"In ascertaining who is liable for the act of a wrong-doer, you must look to the wrong-doer himself or to the first person in the ascending line who is the employer and has control over the work. You cannot go further back and make the employer of that person liable."

It must be remembered that the remoter employer, if at any

point he does interfere and assume specific control, renders himself answerable, not as master, but as principal. He makes himself dominus pro tempore.

The "power of controlling the work" which is the legal criterion of the relation of a master to a servant does not necessarily mean a present and physical ability. Ship-owners are answerable for the acts of the master, though done under circumstances in which it is impossible to communicate with the owners. It is enough that the servant is bound to obey the master's directions if and when communicated to him.

- 2. What acts are deemed to be in the course of service. The injury in respect of which a master becomes subject to this kind of vicarious liability may be caused in the following ways:—
  - (a) It may be the natural consequence of something being done by a servant with ordinary care in execution of the master's specific orders.
  - (b) It may be due to the servant's want of care in carrying on the work or business in which he is employed. This is the commonest case.
  - (c) The servant's wrong may consist in excess or mistaken execution of a lawful authority.
  - (d) Or it may even be a wilful wrong, such as assault, provided the act is done on the master's behalf and with the intention of serving his purposes.
- (a) Execution of specific orders. Here the servant is the master's agent in a proper sense, and the master is liable for that which he has truly, not by the fiction of a legal maxim, commanded to be done. He is also liable for the natural consequences of his orders, even though he wished to avoid them, and desired his servant to avoid them.
- (b) Negligence in conduct of master's business. It must be established that the servant is a wrong-doer, and liable to the plaintiff, before any question of the master's liability can be entertained. Assuming this to be made out, the question may occur whether the servant was in truth on his master's business at

the time, or engaged on some pursuit of his own. In the latter case the master is not liable.

Whether the servant is really bent on his master's affairs or not is a question of fact, but a question which may be troublesome. Not every deviation of the servant from the strict execution of duty, nor every disregard of particular instructions, will be such an interruption of the course of employment as to determine or suspend the master's responsibility. But where there is not merely deviation, but a total departure from the course of the master's business, so that the servant may be said to be "on a frolic of his own," the master is no longer answerable for the servant's conduct.

(c) Excess or mistake in execution of authority. To establish a right of action against the master in such a case it must be shown that (a) the servant intended to do on behalf of his master something of a kind which he was in fact authorized to do;  $(\beta)$  the act, if done in a proper manner, or under the circumstances erroneously supposed by the servant to exist, would have been lawful.

The master is chargeable only for acts of an authorized class which in the particular instance are wrongful by reason of excess or mistake on the servant's part. For acts which he has neither authorized in kind nor sanctioned in particular he is not chargeable. Most of the cases on this head have arisen out of acts of railway servants on behalf of the companies.

But the master is not answerable if the servant takes on himself, though in good faith and meaning to further the master's interest, that which the master has no right to do even if the facts were as the servant thinks them to be. The same rule holds if the particular servant's act is plainly beyond his authority. In a case not clear on the face of it, the extent of the servant's authority is a question of fact. Much must depend on the nature of the matter in which the authority is given.

(d) Lastly, a master may be liable even for wilful and deliberate wrongs committed by the servant, provided they be done on the master's account and for his purposes: and this, no less than in other cases, although the servant's

conduct is of a kind actually forbidden by the master. Sometimes it has been said that a master is not liable for the "wilful and malicious" wrong of his servant. If "malicious" means "committed exclusively for the servant's private ends," or "malice" means "private spite," this is a correct statement; otherwise it is contrary to modern authority. The question is not what was the nature of the act in itself, but whether the servant intended to act in the master's interest.

An employer is liable for frauds of his servant committed without authority, but in the course of the service and for the employer's purposes.

A firm is answerable for fraudulent misappropriation of funds, and the like, committed by one of the partners in the course of the firm's business and within the scope of his usual authority, though no benefit be derived therefrom by the other partners. But the firm is not liable if the transaction undertaken by the defaulting partner is outside the course of partnership business.

3. Injuries to servants by fault of fellow-servants. The common-law rule of master's immunity, as it stood before the Employer's Liability Act of 1880, is that a master is not liable to his servant for injury received from any ordinary risk of or incident to the service, including acts or defaults of any other person employed in the same service. "A servant, when he engages to serve a master, undertakes, as between himself and his master to run all the ordinary risks of the service, including the risk of negligence upon the part of a fellow-servant when he is acting in the discharge of his duty as servant of him who is the common master of both."

The phrase "common employment" is frequent in this class of cases. All persons engaged under the same employer for the purposes of the same business, however different in detail those purposes may be, are fellowservants in a common employment within the meaning of this rule: for example, a carpenter doing work on the roof of an engine-shed and porters moving an engine on a turn-table. Where there is one common general object, in attaining which a servant is exposed to risk, he is not entitled to sue the master if he is injured

by the negligence of another servant while engaged in furthering the same object.

It makes no difference if the servant by whose negligence another is injured is a foreman, manager, or other superior in the same employment, whose orders the other was by the terms of his service bound to obey.

The master is bound, as between himself and his servants, to exercise due care in selecting proper and competent persons for the work whether as fellow-workmen in the ordinary sense, or as superintendents or foremen), and to furnish suitable means and resources to accomplish the work, and he is not answerable further.

A stranger who gives his help without reward to a man's servants engaged in any work is held to put himself, as regards the master's liability towards him, in the same position as if he were a servant.

On the other hand, a master who takes an active part in his own work is not only himself liable to a servant injured by his negligence, but, if he has partners in the business, makes them liable also. For he is the agent of the firm, but not a servant: the partners are generally answerable for his conduct, yet cannot say he was a fellow-servant of the injured man.

The principle of the Employers' Liability Act, 1880, so far as the Act has any principle, is that of holding the employer answerable for the conduct of those who are in delegated authority under him.

#### CHAPTER IV.

#### GENERAL EXCEPTIONS.

Conditions excluding liability for act prima facie wrongful. There are various conditions which, when present, will prevent an act from being wrongful which in their absence would be a wrong. Under such conditions the act is said to be

<sup>&</sup>lt;sup>1</sup> The contrary is held in some of the United States. See, generally, Cooley on Torts, 543.

justified or excused. And when an act is said in general terms to be wrongful, it is assumed that no such qualifying condition exists.

Some of the principles by which liability is excluded are applicable indifferently to all or most kinds of injury, while others are confined to some one species. General exceptions are the exceptions which now concern us. The following seem to be their chief categories. An action is within certain limits not maintainable in respect of the acts of political power called "acts of State," nor of judicial acts. Executive acts of lawful authority form another similar class. Then a class of acts has to be considered which may be called quasi-judicial. and which, also within limits, are protected. Also, there are various cases in which unqualified or qualified immunity is conferred upon private persons exercising an authority or power specially conferred by law. We may regard all these as cases of privilege in respect of the person or the occasion. After these come exceptions which are more an affair of common right: inevitable accident (a point not clearly free from doubt), harm inevitably incident to the ordinary exercise of rights, harm suffered by consent or under conditions amounting to acceptance of the risk, and harm inflicted in self-defence or (in some cases) otherwise by necessity.

# 1. - Acts of State.

The term "Acts of State" appears to signify—(1) An act done or adopted by the prince or rulers of a foreign independent State in their political and sovereign capacity, and within the limits of their de facto political sovereignt; (2) more particularly, "an act injurious to the person or to the property of some person who is not at the time of that act a subject of her Majesty; which act is done by any representative of her Majesty's authority, civil or military, and is either previously sanctioned, or subsequently ratified by her Majesty" (such sanction or ratification being, of course, expressed in the proper manner through responsible ministers).

Our courts of justice profess themselves not competent to discuss acts of these kinds for reasons thus expressed by the Judicial Com-

mittee of the Privy Council:—"The transactions of independent States between each other" (and with subjects of other States), "are governed by other laws than those which municipal courts administer; such courts have neither the means of deciding what is right, nor the power of enforcing any decision which they may make."

The leading case on this subject is Buron v. Denman, 2 Ex. 167.

As between the sovereign and his subjects, however, there can be no such thing as an act of State. Courts of law are established for the express purpose of limiting public authority in its conduct towards individuals. If one British subject puts another to death or destroys his property by the express command of the King, that command is no protection to the person who executes it unless it is in itself lawful, and it is the duty of the proper courts of justice to determine whether it is lawful or not: as, for example, when the Court of King's Bench decided that a Secretary of State had no power to issue general warrants to search for and seize papers and the like.

Acts of foreign powers. There is another quite distinct point of jurisdiction in connection with which the term "act of State" is used. A sovereign prince or other person representing an independent power is not liable to be sued in the courts of this country for acts done in a sovereign capacity; and this even if in some other capacity he is a British subject, as was the case with the King of Hanover, who remained an English peer after the personal union between the Crowns of England and Hanover was dissolved. This rule is included in a wider one, which not only extends beyond the subject of this work, but belongs to international as much as to municipal law. It has been thus expressed by the Court of Appeal: "As a consequence of the absolute independence of every sovereign authority, and of the international comity which induces every sovereign State to respect the independence of every other sovereign State, each and every one declines to exercise, by means of any of its Courts, any of its territorial jurisdiction over the person of any sovereign or ambassador of any other State, or over the public property of any State which is destined to its public use, or over the property of any ambassador, though such sovereign, ambassador, or property be within its territory, and therefore, but for the common agreement, subject to its jurisdiction."

### 2. - Judicial Acts.

As to judicial acts, the rule is that "no action will lie against a judge for any acts done or words spoken in his judicial capacity in a court of justice." And the exemption is not confined to judges of superior courts. But in order to establish the exemption as regards proceedings in an inferior court, the judge must show that at the time of the alleged wrong-doing some matter was before him in which he had jurisdiction (whereas in the case of a superior court it is for the plaintiff to prove want of jurisdiction); and the act complained of must be of a kind which he had power to do as judge in that matter.

A judge is not liable in trespass for want of jurisdiction, unless he knew or ought to have known of the defect; and it lies on the plaintiff, in every such case, to prove that fact. And the conclusion formed by a judge, acting judicially and in good faith, on a matter of fact, which it is within his jurisdiction to determine, cannot be disputed in an action against him for anything judicially done by him in the same cause upon the footing of that conclusion.

Allegations that the act complained of was done "maliciously and corruptly," that words were spoken "falsely and maliciously," or the like, will not serve to make an action of this kind maintainable against a judge either of a superior or of an inferior court.

There are two cases in which by statute an action does or did lie against a judge for misconduct in his office, — namely, if he refuses to grant a writ of habeas corpus in vacation time, and if he refused to seal a bill of exceptions.

The rule of immunity for judicial acts is applied not only to judges of the ordinary civil tribunals, but to members of naval and military courts-martial or courts of inquiry constituted in accordance with military law and usage. It is also applied to a limited extent to arbitrators, and to any person who is in a position like an arbitrator's, as having been chosen by

the agreement of parties to decide a matter that is or may be in difference between them. Such a person, if he acts honestly, is not liable for errors in judgment. He would be liable for a corrupt or partisan exercise of his office; but if he really does use a judicial discretion, the rightness or competence of his judgment cannot be brought into question for the purpose of making him personally liable.

The doctrine of our courts on this subject appears to be fully and uniformly accepted in the United States.

#### 3. - Executive Acts.

As to executive acts of public officers, no legal wrong can be done by the regular enforcement of any sentence or process of law, nor by the necessary use of force for preserving the peace. Private persons are in many cases entitled, and in some bound, to give aid and assistance, or to act by themselves, in executing the law; and in so doing they are similarly protected.

But a public officer may err by going beyond his authority in various ways. When this happens there are distinctions to be observed. The principle which runs through both common law and legislation in the matter is that an officer is not protected from the ordinary consequences of unwarranted acts, which it rested with himself to avoid, such as using needless violence to secure a prisoner; but he is protected if he has only acted in a manner in itself reasonable, and in execution of an apparently regular warrant or order, which, on the face of it, he was bound to obey. This applies only to irregularity in the process of a court having jurisdiction over the alleged cause. Where an order is issued by a court which has no jurisdiction at all in the subject-matter, so that the proceedings are, as it is said, coram non judice, the exemption ceases.

As to a mere mistake of fact, such as arresting the body or taking the goods of the wrong person, an officer of the law is not excused in such a case. He must lay hands on the right person or property at his peril, the only excep-

tion being on the principle of estoppel, where he is misled by the party's own act.

Acts done by naval and military officers in the execution or intended execution of their duty, for the enforcement of the rules of the service and preservation of discipline, fall to some extent under this head. There is very great weight of opinion, but no absolute decision, that an action does not lie in a civil court for bringing an alleged offender against military law (being a person subject to that law) before a court-martial without probable cause. How far the orders of a superior officer justify a subordinate who obeys them as against third persons has never been fully settled. But the better opinion appears to be that the subordinate is in the like position with an officer executing an apparently regular civil process. - namely, that he is protected if he acts under orders given by a person whom he is generally bound by the rules of the service to obey, and of a kind which that person is generally authorized to give, and if the particular order is not necessarily or manifestly unlawful.

The same principles apply to the exemption of a person acting under the orders of any public body competent in the matter in hand. An action does not lie against the Serjeant-at-arms of the House of Commons for excluding a member from the House in obedience to a resolution of the House itself; this being a matter of internal discipline in which the House is supreme.

# 4. — Quasi-judicial Acts.

Divers persons and bodies are called upon, in the management of public institutions or government of voluntary associations, to exercise a sort of conventional jurisdiction analogous to that of inferior courts of justice. These quasi-judicial functions are in many cases created or confirmed by Parliament. Such are the powers of the universities over their officers and graduates, and of colleges in the universities over their fellows and scholars. Often the authority of the quasi-judicial body depends on an instrument of foundation, the provisions of which are binding on all persons who accept benefits under it. Such are the cases of endowed schools and

religious congregations. And the same principle appears in the constitution of modern incorporated companies, and even of private partnerships. Further, a quasi-judicial authority may exist by the mere convention of a number of persons who have associated themselves for any lawful purpose, and have entrusted powers of management and discipline to select members. The committees of most clubs have by the rules of the club some such authority, or at any rate an initiative in presenting matters of discipline before the whole body. The Inns of Court exhibit a curious and unique example of great power and authority exercised by voluntary unincorporated societies in a legally anomalous manner. Their powers are for some purposes quasi-judicial, and yet they are not subject to any ordinary jurisdiction.

The general rule as to quasi-judicial powers of this class is that persons exercising them are protected from civil liability if they observe the rules of natural justice, and also the particular statutory or conventional rules, if any, which may prescribe their course of action. The rules of natural justice appear to mean, for this purpose, that a man is not to be removed from office or membership. or otherwise dealt with to his disadvantage, without having fair and sufficient notice of what is alleged against him, and an opportunity of making his defence; and that the decision, whatever it is, must be arrived at in good faith with a view to the common interest of the society or institution concerned. If these conditions be satisfied, a court of justice will not interfere. not even if it thinks the decision was in fact wrong. If not, the act complained of will be declared void, and the person affected by it maintained in his rights until the matter has been properly and regularly dealt with. These principles apply to the expulsion of a partner from a private firm where a power of expulsion is conferred by the partnership contract.

Absolute discretionary powers. It may be, however, that by the authority of Parliament (or, it would seem, by the previous agreement of the party to be affected) a governing or administrative body, or the majority of an association, has power to remove a man from office, or the like, without anything in the nature of judicial proceedings, and without showing any cause at all. Whether a

particular authority is judicial or absolute must be determined by the terms of the particular instrument creating it.

On the other hand there may be question whether the duties of a particular office be quasi-judicial, or merely ministerial, or judicial for some purposes and ministerial for others. It seems that at common law the returning or presiding officer at a parliamentary or other election has a judicial discretion, and does not commit a wrong if by an honest error of judgment he refuses to receive a wote; but now in most cases it will be found that such officers are under absolute statutory duties which they must perform at their peril.

# 5. - Parental and quasi-parental Authority.

There are several kinds of authority in the way of summary force or restraint which the necessities of society require to be exercised by private persons. And such persons are protected in exercise thereof, if they act with good faith and in a reasonable and moderate manner.

Parental authority (whether in the hands of a father or guardian, or of a person to whom it is delegated, such as a schoolmaster) is the most obvious and universal instance.

Persons having the lawful custody of a lunatic, and those acting by their direction, are justified in using such reasonable and moderate restraint as is necessary to prevent the lunatic from doing mischief to himself or others, or required, according to competent opinion, as part of his treatment.

In the case of a drunken man, or one deprived of selfcontrol by a fit or other accident, the use of moderate restraint, as well for his own benefit as to prevent him from doing mischief to others, may in the same way be justified.

# 6. - Authorities of Necessity.

The master of a merchant ship has by reason of necessity the right of using force to preserve order and discipline for the safety of the vessel and the persons and property on board. The master may even be justified in a case of extreme danger in inflicting punishment without any form of inquiry. But

"in all cases which will admit of the delay proper for inquiry, due inquiry should precede the act of punishment; and . . . the party charged should have the benefit of that rule of universal justice, of being heard in his own defence." In fact, when the immediate emergency of providing for the safety and discipline of the ship is past, the master's authority becomes a quasi-judicial one.

# 7. — Damage incident to Authorized Acts.

The general precept of law is commonly stated to be sic utere two ut alienum non lædas. If this were literally and universally applicable, a man would act at his peril whenever and wherever he acted otherwise than as the servant of the law. But the precept is understood to be subject to large exceptions. Its real use is to warn us against the abuse of the more popular adage that "a man has a right to do as he likes with his own," which errs much more dangerously on the other side.

There are limits to what a man may do with his own; and if he does that which may be harmful to his neighbor, it is his business to keep within those limits. Neither the Latin nor the vernacular maxim will help us much, however, to know where the line is drawn. The problems raised by the apparent opposition of the two principles must be dealt with each on its own footing.

Damage from execution of authorized works. "No action will lie for doing that which the Legislature has authorized, if it be done without negligence, although it does occasion damage to any one." The meaning of the qualification will appear immediately. Subject thereto, "the remedy of the party who suffers the loss is confined to recovering such compensation (if any) as the Legislature has thought fit to give him." Instead of the ordinary question whether a wrong has been done, there can only be a question whether the special power which has been exercised is coupled, by the same authority that created it, with a special duty to make compensation for incidental damage.

Apart from the question of statutory compensation, no action can be maintained for loss or inconvenience which is the necessary consequence of an authorized thing being done in an authorized manner.

But in order to secure this immunity the powers conferred by the Legislature must be exercised without negligence, or, as it is perhaps better expressed, with judgment and caution. For damage which could not have been avoided by any reasonably practicable care on the part of those who are authorized to exercise the power, there is no right of action. they must not do needless harm; and if they do, it is a wrong against which the ordinary remedies are available. "When the company can construct its works without injury to private rights. it is in general bound to do so." Hence there is a material distinction between cases where the Legislature "directs that a thing shall at all events be done," and those where it only gives a discretionary power with choice of times and places. Where a discretion is given, it must be exercised with regard to the common rights of others. And even where a particular thing is required to be done. the burden of proof is on the person who has to do it to show that it cannot be done without creating a nuisance.

### 8. - Inevitable Accident.

The question now to be considered is whether an action lies against me for harm resulting by inevitable accident from an act lawful in itself, and done by me in a reasonable and careful manner.

Inevitable accident does not mean absolutely inevitable (for by the supposition I was not bound to act at all), but it means not avoidable by any such precaution as a reasonable man, doing such an act then and there, could be expected to take.

We believe that our modern law supports the view now indicated as the rational one, that inevitable accident is not a ground of liability. But there is a good deal of appearance of authority in the older books for the contrary proposition that a man must answer for all direct consequences of his voluntary acts at any rate.

## 9. - Exercise of Common Rights.

The rule of law is that the exercise of ordinary rights for a lawful purpose and in a lawful manner is no wrong even if it causes damage.

Competition in business, for example, is in itself no ground of action, whatever damage it may cause. A trader can complain of his rival only if a definite exclusive right, such as a patent right, or the right to a trademark, is infringed, or if there is a wilful attempt to damage his business by injurious falsehood ("slander of title") or acts otherwise unlawful in themselves.

Another group of authorities of the same class is that which establishes "that the disturbance or removal of the soil in a man's own land, though it is the means (by process of natural percolation) of drying up his neighbor's spring or well, does not constitute the invasion of a legal right, and will not sustain an action."

There are many other ways in which a man may use his own property to the prejudice of his neighbor, and yet no action lies. I have no remedy against a neighbor who opens a new window so as to overlook my garden: on the other hand, he has none against me if, at any time before he has gained a prescriptive right to the light, I build a wall or put up a screen so as to shut out his view from that window. But the principle in question is not confined to the use of property. It extends to every exercise of lawful discretion in a man's own affairs.

Again, our law does not in general recognize any exclusive right to the use of a name, personal or local. I may use a name similar to that which my neighbor uses—and that whether I inherited or found it, or have assumed it of my own motion—so long as I do not use it to pass off my wares or business as being his. The fact that inconvenience arises from the similarity will not of itself constitute a legal injury, and allegations of pecuniary damage will not add any legal effect. "You must have in our law injury as well as damage."

#### 10. - Leave and License.

Harm suffered by consent is, within limits to be mentioned, not a cause of civil action. The same is true where it is met with under conditions manifesting acceptance, on the part of the person suffering it, of the risk of that kind of harm. The maxim by which the rule is commonly brought to mind is volenti non fit iniuria. "Leave and license" is the current English phrase for the defence raised in this class of cases.

The case of express consent is comparatively rare in our books, except in the form of a license to enter upon land.

Force to the person is rendered lawful by consent in such matters as surgical operations. In the case of a person under the age of discretion, the consent of that person's parent or guardian is generally necessary and sufficient.

But consent alone is not enough to justify what is on the face of it bodily harm. There must be some kind of just cause, as the cure or extirpation of disease in the case of surgery. Wilful hurt is not excused by consent or assent if it has no reasonable object. Thus if a man licenses another to beat him, not only does this not prevent the assault from being a punishable offence, but the better opinion is that it does not deprive the party beaten of his right of action.

Agreement will not justify the wilful causing or endeavoring to cause appreciable bodily harm for the mere pleasure of the parties or others. Boxing with properly padded gloves is lawful, because in the usual course of things harmless. Fighting with the bare fist is not. Football is a lawful pastime, though many kicks are given and taken in it; a kicking match is not.

A blow struck in anger, or which is likely or is intended to do corporal hurt, is an assault, but a blow struck in sport, and not likely nor intended to cause bodily harm, is not an assault, and an assault being a breach of the peace and unlawful, the consent of the person struck is immaterial. If this view is correct a blow struck in a prize-fight is clearly an assault; but playing with single-sticks or wrestling does not involve an assault, nor does boxing with gloves in the ordinary way.

A license obtained by fraud is of no effect.

Trials of strength and skill in such pastimes as those above mentioned afford, when carried on within lawful bounds, the best illustration of the principle by which the maxim volentinon fit iniuria is enlarged beyond its literal meaning. A man cannot complain of harm (within the limits we have mentioned) to the chances of which he has exposed himself with knowledge and of his free will.

This distinction should be remembered that where the plaintiff has voluntarily put himself in the way of risk the defendant is not bound to disprove negligence. If I choose to stand near a man using an axe, he may be a good woodman or not; but I cannot (it is submitted) complain of an accident because a more skilled woodman might have avoided it. This, or even more, is implied in the decision in llott v. Wilkes, where it was held that one who trespassed in a wood, having notice that spring-guns were set there, and was shot by a spring-gun, could not recover. The maxim volcuti non fit iniuriu was expressly held applicable: "he voluntarily exposes himself to the mischief which has happened."

# 11. - Works of Necessity.

A class of exceptions as to which there is not much authority is that of acts done of necessity to avoid a greater harm, and on that ground justified

Pulling down houses to stop a fire and casting goods overboard, or otherwise sacrificing property to save a ship or the lives of those on board, are the regular examples. It is said, also, that "in time of war one shall justify entry on another's land to make a bulwark in defence of the king and the kingdom." In these cases the apparent wrong "sounds for the public good."

There are also circumstances in which a man's property or person may have to be dealt with promptly for his own obvious good, but his consent, or the consent of any one having lawful authority over him, cannot be obtained in time. Here it is evidently justifiable to do what needs to be done, in a proper and reasonable manner of course. It is not even technically

a trespass if I throw water on my neighbor's goods to save them from fire, or, seeing his house on fire, enter on his land to help in putting it out. Nor is it an assault for the first passer-by to pick up a man rendered insensible by an accident, or for a competent surgeon, if he perceives that an operation ought forthwith to be performed to save the man's life, to perform it without waiting for him to recover consciousness and give his consent. These works of charity and necessity must be lawful as well as right.

## 12. - Private Defence.

Self-defence (or rather private defence, for defence of one's self is not the only case) is another ground of immunity. To repel force by force is the common instinct of every creature that has means of defence. And when the original force is unlawful, this natural right or power of man is allowed, nay approved, by the law. Sudden and strong resistance to unrighteous attack is not merely a thing to be tolerated; in many cases it is a moral duty. The right extends not only to the defence of a man's own person, but to the defence of his property or possession. And what may be lawfully done for one's self in this regard may likewise be done for a wife or husband, a parent or child, a master or servant.

The force employed must not be out of proportion to the apparent urgency of the occasion. The person acting on the defensive is entitled to use as much force as he reasonably believes to be necessary. It is said that a man attacked with a deadly weapon must retreat as far as he safely can before he is justified in defending himself by like means. But this probably applies (so far as it is the law) only to criminal liability. On the other hand if a man presents a pistol at my head and threatens to shoot me, peradventure the pistol is not loaded or is not in working order, but I shall do no wrong before the law by acting on the supposition that it is really loaded and capable of shooting.

Cases have arisen on the killing of animals in defence of one's property. Here, as elsewhere, the test is whether the party's act was such as he might reasonably, in the

circumstances, think necessary for the prevention of harm which he was not bound to suffer.

Injuries received by an innocent third person from an act done in self-defence, must be dealt with on the same principle as accidental harm proceeding from any other act lawful in itself. It has to be considered, however, that a man repelling imminent danger cannot be expected to use as much care as he would if he had time to act deliberately.

A man cannot, however, justify doing for the protection of his own property, a deliberate act whose evident tendency is to cause, and which does cause, damage to the property of an innocent neighbor.

## 13. - Plaintiff a Wrong-doer.

Language is to be met with in some books to the effect that a man cannot sue for any injury suffered by him at a time when he is himself a wrong-doer. there is no such general rule of law. If there were, one consequence would be that an occupier of land (or even a fellowtrespasser) might beat or wound a trespasser without being liable to an action, whereas the right of using force to repel trespass to land is strictly limited; or if a man is riding or driving at an incautiously fast pace, anybody might throw stones at him with impunity. And generally, "a trespasser is liable to an action for the injury which he does; but he does not forfeit his right of action for an injury sustained." It does not appear on the whole that a plaintiff is disabled from recovering by reason of being himself a wrong-doer, unless some unlawful act or conduct on his own part is connected with the harm suffered by him as part of the same transaction; and even then it is difficult to find a case where it is necessary to assume any special rule of this kind.

In America there has been a great question, upon which there have been many contradictory decisions, whether the violation of statutes against Sunday travelling is in itself a bar to actions for injuries received in the course of such travelling through defective condition of roads, negligence of railway companies, and the like.

In Massachusetts it has been held that a plaintiff in such circumstances cannot recover, although the accident might just as well have happened on a journey lawful for all purposes. These decisions are not generally considered good law, and have been expressly dissented from in some other States.

It is a rule not confined to actions on contracts that "the plaintiff cannot recover where in order to maintain his supposed claim he must set up an illegal agreement to which he himself has been a party;" but its application to actions of tort is not frequent or normal.

#### CHAPTER V.

#### OF REMEDIES FOR TORTS.

At common law there were only two kinds of redress for an actionable wrong. One was in those cases—exceptional cases according to modern law and practice—where it was and is lawful for the aggrieved party, as the common phrase goes, to take the law into his own hands. The other way was an action for damages. Not that a suitor might not obtain, in a proper case, other and more effectual redress than money compensation; but he could not have it from a court of common law. Specific orders and prohibitions in the form of injunctions or otherwise were (with few exceptions, if any) in the hand of the Chancellor alone, and the principles according to which they were granted or withheld were counted among the mysteries of Equity. But no such distinctions exist under the system of the Judicature Acts, and every branch of the Court has power to administer every remedy.

Remedies available to a party by his own act alone may be included, after the example of the long-established German usage, in the expressive name of self-help. The right of private defence appears at first sight to be an obvious example of this. But it is not so, for there is no question of remedy in such a case. We are allowed to repel force by force "not for the redress of injuries,

but for their prevention." It is only when the party's lawful act restores to him something which he ought to have, or puts an end to a state of things whereby he is wronged, or at least puts pressure on the wrong-doer to do him right, that self-help is a true remedy. And then it is not necessarily a complete or exclusive remedy.

The acts of this nature which we meet with in the law of torts are expulsion of a trespasser, retaking of goods by the rightful possessor, distress of cattle damage feasant, and abatement of nuisances. Peaceable re-entry upon land where there has been a wrongful change of possession might be added to the list; but it hardly occurs in modern experience. Analogous to the right of retaking goods is the right of appropriating or retaining debts under certain conditions; and various forms of lien are more or less analogous to distress. These, however, belong to the domain of contract. In every case alike the right of the party is subject to the rule that no greater force must be used, or damage done to property, than is necessary for the purpose in hand.

Remedies by the act of the law. The most frequent and familiar of these is the awarding of damages. Whenever an actionable wrong has been done, the party wronged is entitled to recover damages. His title to recover is a conclusion of law from the facts determined in the cause. How much he shall recover is a matter of judicial discretion, a discretion exercised, if a jury tries the cause, by the jury under the guidance of the judge.

Damages may be nominal, ordinary, or exemplary. Mominal damages are a sum of so little value as compared with the cost and trouble of suing that it may be said to have "no existence in point of quantity," such as a shilling or a penny, which sum is awarded with the purpose of not giving any real compensation. Such a verdict means one of two things. According to the nature of the case it may be honorable or contumelious to the plaintiff. Either the purpose of the action is merely to establish a right, no substantial harm or loss having been suffered, or else the jury, while unable to deny that some legal wrong has been done to the plaintiff, have formed a very low opinion of the general merits of his case. This again may be on the ground that the harm he suffered was not worth suing for, or that his own conduct had

been such that whatever he did suffer at the defendant's hands was morally deserved. The former state of things, where the verdict really operates as a simple declaration of rights between the parties, is most commonly exemplified in actions of trespass brought to settle disputed claims to rights of way, rights of common, and other easements and profits. The other kind of award of nominal damages, where the plaintiff's demerits earn him an illusory sum such as one farthing, is illustrated chiefly by cases of defamation, where the words spoken or written by the defendant cannot be fully justified, and yet the plaintiff has done so much to provoke them, or is a person of such generally worthless character, as not to deserve, in the opinion of the jury, any substantial compensation.

Infringements of absolute rights like those of personal security and property give a cause of action without regard to the amount of harm done, or to there being harm estimable at any substantial sum at all. As Holt, C.J., said, in a celebrated passage of his judgment in Ashby v. White, "a damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right."

On the other hand, there are cases, even in the law of property, where, as it is said, damage is the gist of the action. and there is not an absolute duty to forbear from doing a certain thing, but only not to do it so as to cause actual damage. The right to the support of land as between adjacent owners. or as between the owner of the surface and the owner of the mine beneath, is an example. My neighbor may excavate in his own land as much as he pleases, unless and until there is actual damage to mine: then, and not till then, a cause of action arises for me. Negligence, again, is a cause of action only for a person who suffers actual harm by reason of it. The same rule holds of nuisances. So, in an action of deceit, the cause of action is the plaintiff's having suffered damage by acting on the false statement made to him by the defendant. In all these cases there can be no question of nominal damages, the proof of real damage being the foundation of the plaintiff's right.

In the law of slander some kinds of spoken defamation are actionable without any allegation or proof of special damage (in which case the plaintiff is entitled to nominal damages at least), and others not; while as to written words no such distinction is made.

Ordinary damages are a sum awarded as a fair measure of compensation to the plaintiff, the amount being, as near as can be estimated, that by which he is the worse for the defendant's wrong-doing, but in no case exceeding the amount claimed by the plaintiff himself. Compensation, not restitution, is the proper test.

One step more, and we come to cases where there is great injury without the possibility of measuring compensation by any numerical rule, and juries have been not only allowed but encouraged to give damages that express indignation at the defendant's wrong rather than a value set upon the plaintiff's loss. Damages awarded on this principle are called exemplary or vindictive. The kind of wrongs to which they are applicable are those which, besides the violation of a right or the actual damage, import insult or outrage, and so are not merely injuries. but iniuriæ in the strictest Roman sense of the term. An assault and false imprisonment under color of a pretended right in breach of the general law, and against the liberty of the subject; a wanton trespass on land, persisted in with violent and intemperate behavior; the seduction of a man's daughter with deliberate fraud, or otherwise under circumstances of aggravation. such are the acts which, with the open approval of the Courts, juries have been in the habit of visiting with exemplary damages. Gross defamation should perhaps be added; but there it is rather that no definite principle of compensation can be laid down than that damages can be given which are distinctly not compensation. It is not found practicable to interfere with juries either way, unless their verdict shows manifest mistake or improper motive.

There are other miscellaneous examples of an estimate of damages colored, so to speak, by disapproval of the defendant's conduct (and in the opinion of the court legitimately so), though it be not a case for vindictive or exemplary damages in the proper sense. In an action for trespass to

land or goods substantial damages may be recovered, though no loss or diminution in value of property may have occurred. In an action for negligently pulling down buildings to an adjacent owner's damage, evidence has been admitted that the defendant wanted to disturb the plaintiff in his occupation, and purposely caused the work to be done in a reckless manner; and it was held that the judge might properly authorize a jury to take into consideration the words and conduct of the defendant "showing a contempt of the plaintiff's rights and of his convenience."

The action for breach of promise of marriage, being an action of contract, is not within the scope of this work; but it has curious points of affinity with actions of tort in its treatment and incidents; one of which is that a very large discretion is given to the jury as to damages.

As damages may be aggravated by the defendant's ill-behavior or motives, so they may be reduced by proof of provocation, or of his having acted in good faith; and many kinds of circumstances which will not amount to justification or excuse are for this purpose admissible and material. "In all cases where motive may be ground of aggravation, evidence on this score will also be admissible in reduction of damages."

"Damages resulting from one and the same cause of action must be assessed and recovered once for all;" but where the same facts give rise to two distinct causes of action, though between the same parties, action and judgment for one of these causes will be no bar to a subsequent action on the other.

Another remedy which is not, like that of damages, universally applicable, but which is applied to many kinds of wrongs where the remedy of damages would be inadequate or practically worthless, is the granting of an injunction to restrain the commission of wrongful acts threatened, or the continuance of a wrongful course of action already begun. The kinds of tort against which this remedy is commonly sought are nuisances, violations of specific rights of property in the nature of nuisance, such as obstruction of light and disturbance of easements, continuing trespasses, and infringements of copyright and trademarks.

The cases in which an injunction will be granted are all of them

developments of the one general principle that an injunction is granted only where damages would not be an adequate remedy, and an interim injunction only where delay would make it impossible or highly difficult to do complete justice at a later stage.

In certain cases of fraud (that is, wilfully or recklessly false representation of fact), the Court of Chancery had before the Judicature Act concurrent jurisdiction with the courts of common law, and would award pecuniary compensation, not in the name of damages indeed, but by way of restitution or "making the representation good." In substance, however, the relief came to giving damages under another name, and with more nicety of calculation than a jury would have used.

Duties of a public nature are constantly defined or created by statute, and generally, though not invariably, special modes of enforcing them are provided by the same statutes. If the Legislature at the same time that it creates a new duty. points out a special course of private remedy for the person aggrieved (for example, an action for penalties to be recovered, wholly or in part, for the use of such person), then it is generally presumed that the remedy so provided was intended to be, and is, the only remedy. The provision of a public remedy without any special means of private compensation is in itself consistent with a person specially aggrieved having an independent right of action for injury caused by a breach of the statutory duty. And it has been thought to be a general rule that where the statutory remedy is not applicable to the compensation of a person injured, that person has a right of action. But the Court of Appeals has repudiated any such fixed rule, and has laid down that the possibility or otherwise of a private right of action for the breach of a public statutory duty must depend on the scope and language of the statute taken as a whole.

Also the harm in respect of which an action is brought for the breach of a statutory duty must be of the kind which the statute was intended to prevent. If cattle being carried on a ship are washed overboard for want of appliances prescribed by an Act of Parliament for purely sanitary purposes, the shipowner is not liable to the owner of the cattle by reason of the breach of the statute; though he will be liable if his conduct amounts to negligence apart from the statute and with regard to the duty of safe carriage which he has undertaken, and in an action not founded on a statutory duty the disregard of such a duty, if likely to cause harm of the kind that has been suffered, may be a material fact.

Where more than one person is concerned in the commission of a wrong, the person wronged has his remedy against all or any one or more of them at his choice. Every wrong-doer is liable for the whole damage, and it does not matter whether they acted, as between themselves, as equals, or one of them as agent or servant of another. There are no degrees of responsibility, nothing answering to the distinction in criminal law between principals and accessories. But when the plaintiff in such a case has made his choice, he is concluded by it. After recovering judgment against some or one of the joint authors of a wrong, he cannot sue the other or others for the same matter, even if the judgment in the first action remains unsatisfied. [In the United States there is no bar till satisfaction.]

As between joint wrong-doers themselves, one who has been sued alone and compelled to pay the whole damages has no right to indemnity or contribution from the other, if the nature of the case is such that he "must be presumed to have known that he was doing an unlawful act." Otherwise, "where the matter is indifferent in itself," and the wrongful act is not clearly illegal, but may have been done in honest ignorance, or in good faith to determine a claim of right, there is no objection to contribution or indemnity being claimed. The proposition that there is no contribution between wrong-doers must be understood to affect only those who are wrong-doers in the common sense of the word as well as in law. The wrong must be so manifest that the person doing it could not at the time reasonably suppose that he was acting under lawful authority.

It has been currently said, sometimes laid down, and once or twice acted on as established law, that when the facts affording a cause of action in tort are such as to amount to a felony, there is no civil remedy against the felon for the wrong,—at all events before the crime has been prosecuted to conviction. And as, before 1870,¹ a convicted felon's property was forfeited, there would at common law be no effectual remedy afterwards. So that the compendious form in which the rule was often stated, that "the trespass was merged in the felony," was substantially if not technically correct. But so much doubt has been thrown upon the supposed rule in several recent cases, that it seems, if not altogether exploded, to be only awaiting a decisive abrogation.

Locality of wrongs. No action can be maintained in respect of an act committed beyond the territorial jurisdiction of the court, which is justified or excused according to both English and local law. Besides this obvious case, the following states of things are possible:—

- 1. The act may be such that, although it may be wrongful by the local law, it would not be a wrong if done in England. In this case no action lies in an English court:—
- 2. The act, though in itself it would be a trespass by the law of England, may be justified or excused by the local law. Here also there is no remedy in an English court. And it makes no difference whether the act was from the first justifiable by the local law, or, not being at the time justifiable, was afterwards ratified or excused by a declaration of indemnity proceeding from the local sovereign power. But nothing less than justification by the local law will do. Conditions of the lex forisuspending or delaying the remedy in the local courts will not be a ber to the remedy in an English court in an otherwise proper case. And our courts would possibly make an exception to the rule if it appeared that by the local law there was no remedy at all for a manifest wrong, such as assault and battery committed without any special justification or excuse.
- 3. The act may be wrongful by both the law of England and the law of the place where it was done. In such a case an action lies in England, without regard to the nationality of the parties, provided the cause of action is not of a purely local kind, such as trespass to land.

The times in which actions of tort must be brought are fixed by the Statute of Limitation of James I. (21 Jac. 1, c. 16) as modified by later enactments. [The student should in this connection consult the statute of his own State.]

Persons who at the time of their acquiring a cause of action are infants, married women, or lunatios, have the period of limitation reckoned against them only from the time of the disability ceasing; and if a defendant is beyond seas at the time of the right of action arising, the time runs against the plaintiff only from his return.

Where damage is the gist of the action, the time runs only from the actual happening of the damage.

The operation of the Statute of Limitation is further subject to the exception of concealed fraud, derived from the doctrine and practice of the Court of Chancery. Where a wrong-doer fraudulently conceals his own wrong, the period of limitation runs only from the time when the plaintiff discovers the truth, or with reasonable diligence would discover it.

# BOOK II.

#### SPECIFIC WRONGS.

## CHAPTER VI.

### PERSONAL WRONGS.

# 1. — Assault and Battery.

The application of unlawful force to another constitutes the wrong called battery; an action which puts another in instant fear of unlawful force, though no force be actually applied, is the wrong called assault. These wrongs are likewise indictable offences.

"The least touching of another in anger is a battery;"
for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it." It is immaterial not only whether the force applied be sufficient in degree to cause actual hurt, but whether it be of such a kind as is likely to cause it. Again it does not matter whether the force used is applied directly or indirectly, to the human body itself or to anything in contact with it; nor whether with the hand or anything held in it, or with a missile.

Battery includes assault, and though assault strictly means an inchoate battery, the word is in modern usage constantly made to include battery. The essence of the wrong of assault is putting a man in present fear of violence, so that any act fitted to have that effect on a reasonable man may be an assault, though there is no real present ability to do the harm threatened. Acts capable in themselves of being an assault may be explained or qualified by words or circumstances contradicting what might otherwise be inferred from them. A man put his hand on his sword and said,

"If it were not assize-time, I would not take such language from you;" this was no assault, because the words excluded an intention of actually striking.

Hostile or unlawful intention is necessary to constitute an indictable assault; and such touching, pushing, or the like as belongs to the ordinary conduct of life, and is free from the use of unnecessary force, is neither an offence nor wrong.

Mere passive obstruction is not an assault, as where a man by standing in a doorway prevents another from coming in.

Words cannot of themselves amount to an assault under any circumstances.

Consent, or in the common phrase "leave and license," will justify many acts which would otherwise be assaults, striking in sport, for example; or even, if coupled with reasonable cause, wounding and other acts of a dangerous kind, as in the practice of surgery. But consent will not make acts lawful which are a breach of the peace, or otherwise criminal in themselves, or unwarrantably dangerous

It has been repeatedly held in criminal cases of assault that an unintelligent assent, or a consent obtained by fraud, is of no effect. The same principles would no doubt be applied by courts of civil jurisdiction if necessary.

When one is wrongfully assaulted it is lawful to repel force by force (as also to use force in the defence of those whom one is bound to protect, or for keeping the peace), provided that no unnecessary violence be used. How much force, and of what kind, it is reasonable and proper to use in the circumstances must always be a question of fact. The resistance must "not exceed the bounds of mere defence and prevention," or the force used in defence must be not more than "commensurate" with that which provoked it.

Menace without assault is in some cases actionable. But this is on the ground of its causing a certain special kind of damage; and then the person menaced need not be the person who suffers damage. In fact the old authorities are all, or nearly all, on intimidation of a man's servants or tenants whereby he loses their service or dues. Verbal threats of personal violence are not, as such, a ground, of civil action at all. If a man is thereby put in reasonable bodily fear he has his remedy, but not a civil one, namely, by security of the peace.

# 2. — False Imprisonment.

Freedom of the person includes immunity not only from the actual application of force, but from every kind of detention and restraint not authorized by law. The infliction of such restraint is the wrong of false imprisonment: which, though generally coupled with assault, is nevertheless a distinct wrong. Laving on of hands or other actual constraint of the body is not a necessary element. confinement of the person is an imprisonment, whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets." And when a man is lawfully in a house, it is imprisonment to prevent him from leaving the room in which he is. The detainer, however, must be such as to limit the party's freedom of motion in all directions. It is not an imprisonment to obstruct a man's passage in one direction only. A man is not imprisoned who has an escape open to him; that is, a means of escape which a man of ordinary ability can use without peril of life or limb.

When an action for false imprisonment is brought and defended, the real question in dispute is mostly, though not always, whether the imprisonment was justified. We have considered, under the head of General Exceptions, the principles on which persons acting in the exercise of special duties and authorities are entitled to absolute or qualified immunity. With regard to the lawfulness of arrest and imprisonment in particular, there are divers and somewhat minute distinctions between the powers of a peace-officer and those of a private citizen; of which the chief is that an officer may without a warrant arrest on reasonable suspicion of felony, even though a felony has not in fact been committed, whereas a private person so arresting, or causing to be arrested, an alleged offender must show not only that he had reasonable grounds

of suspicion, but that a felony had actually been committed.

Every one is answerable for specifically directing the arrest or imprisonment of another, as for any other act that he specifically commands or ratifies; and a superior officer who finds a person taken into custody by a constable under his orders, and then continues the custody, is liable to an action if the original arrest was unlawful. Nor does it matter whether he acts in his own interest or another's. But one is not answerable for acts done upon his information or suggestion by an officer of the law, if they are done not as merely ministerial acts, but in the exercise of the officer's proper authority or discretion. A party who sets the law in motion without making its act his own is not necessarily free from liability. He may be liable for malicious prosecution; but he cannot be sued for false imprisonment, or in a court which has not jurisdiction over cases of malicious prosecution.

What is reasonable cause of suspicion to justify arrest is - paradoxical as the statement may look - neither a question of law nor of fact. Not of fact, because it is for the judge and not for the jury; not of law, because "no definite rule can be laid down for the exercise of the judge's judgment." It is a matter of judicial discretion, such as is familiar enough in the classes of cases which are disposed of by a judge sitting alone. The only thing which can be certainly affirmed in general terms about the meaning of "reasonable cause" in this connection is that on the one hand a belief honestly entertained is not of itself enough; on the other hand, a man is not bound to wait until he is in possession of such evidence as would be admissible and sufficient for prosecuting the offence to conviction, or even of the best evidence which he might obtain by further inquiry. "It does not follow that because it would be very reasonable to make further inquiry, it is not reasonable to act without doing so." It is obvious, also, that the existence or non-existence of reasonable cause must be judged, not by the event, but by the party's means of knowledge at the time.

## 3. - Injuries in Family Relations.

The development of the law upon this subject has been strangely halting and one-sided. Starting from the particular case of a hired servant, the authorities have dealt with other relations, not by openly treating them as analogous in principle, but by importing into them the fiction of actual service; with the result that in the class of cases most prominent in modern practice, namely, actions brought by a parent (or person in loco parentis) for the seduction of a daughter, the test of the plaintiffs right has come to be, not whether he has been injured as the head of a family, but whether he can make out a constructive "loss of service."

The common law provided a remedy by writ of trespass for the actual taking away of a wife, servant, or heir, and perhaps younger child also. An action of trespass also lay for wrongs done to the plaintiff's wife or servant (not to a child as such), whereby he lost the society of the former or the services of the latter. The language of pleading was per quod consortium, or servitium, amisit. Such a cause of action was quite distinct from that which the husband might acquire in right of the wife, or the servant in The trespass is one, but the remedies are "diverhis own right. "If my servant is beat, the master shall not sis respectibus." have an action for this battery, unless the battery is so great that by reason thereof he loses the service of his servant, but the servant himself for every small battery shall have an action; and the reason of this difference is that the master has not any damage by the personal beating of his servant, but by reason of a per quod, namely, per quod servitium, &c. amisit; so that the original act is not the cause of his action, but the consequent upon it, namely, the loss of his service is the cause of his action : for be the battery greater or less, if the master doth not lose the service of his servant, he shall not have an action." The same rule applies to the beating or maltreatment of a man's wife, provided it be "very enormous, so that thereby the husband is deprived for any time of the company andassistance of his wife."

Against an adulterer the husband had an action at common law, commonly known as an action of criminal conversation. In form it was generally trespass vi et armis, on the theory that "a wife is not, as regards her husband a free agent or separate person," and therefore her consent was immaterial, and the husband might sue the adulterer as he might have sued any mere trespasser who beat, imprisoned, or carried away his wife against her will.

An action also lay for enticing away a servant (that is, procuring him or her to depart voluntarily from the master's service), and also for knowingly harboring a servant during breach of service; whether by the common law, or only after and by virtue of the Statute of Laborers, 1 is doubtful.

Much later the experiment was tried with success of a husband bringing a like action "against such as persuade and entice the wife to live separate from him without a sufficient cause."

Still later the action for enticing away a servant. per quod servitium amisit, was turned to the purpose for which alone it may now be said to survive, that of punishing seducers; for the latitude allowed in estimating damages makes the proceeding in substance almost a penal one.

In this kind of action it is not necessary to prove the existence of a binding contract of service between the plaintiff and the person seduced or enticed away. The presence or absence of seduction in the common sense (whether the defendant "debauched the plaintiff's daughter," in the forensic phrase) makes no difference in this respect; it is not a necessary part of the cause of action, but only a circumstance of aggravation. Whether that element be present or absent, proof of a de facto relation of service is enough; and any fraud whereby the servant is induced to absent himself or herself affords a ground of action, "when once the relation of master and servant at the time of the acts complained of is established."

And a de facto service is not the less recognized because a third party may have a paramount claim: a married woman living apart from her husband in her father's house may be her father's servant, even though that relation might

be determined at the will of the husband. Some evidence of such a relation there must be, but very little will serve. "The right to the service is sufficient."

Partial attendance in the parent's house is enough to constitute service, as where a daughter employed elsewhere in the daytime is, without consulting her employer, free to assist, and does assist, in the household when she comes home in the evening.

Some loss of service, or possibility of service, must be shown as consequent on the seduction; but when that condition is once satisfied, the damages that may be given are by no means limited to an amount commensurate with the actual loss of service proved or inferred. The awarding of exemplary damages is indeed rather encouraged than otherwise. It is immaterial whether the plaintiff be a parent or kinsman, or a stranger in blood who has adopted the person seduced.

On the same principle or fiction of law a parent can sue in his own name for any injury done to a child living under his care and control, provided the child is old enough to be capable of rendering service; otherwise not, for "the gist of the action depends upon the capacity of the child to perform acts of service."

The capricious working of the action for seduction in modern practice has often been the subject of censure. Thus, Serjeant Manning wrote forty years ago: "the quasi fiction of servitium amisit affords protection to the rich man whose daughter occasionally makes his tea, but leaves without redress the poor man whose child is sent unprotected to earn her bread amongst strangers."

#### CHAPTER VII.

#### DEFAMATION.

The wrong of defamation may be committed either by way of speech, or by way of writing or its equivalent. I For this purpose it may be taken that significant gestures (as the finger language of the deaf and dumb) are in the

same case with audible words; and there is no doubt that printing, engraving, drawing, and every other use of permanent visible symbols to convey distinct ideas, are in the same case with writing. The term slander is appropriated to the former kind of utterances. libel to the latter. Using the terms "written" and "spoken" in an extended sense, to include the analogous cases just mentioned, we may say that slander is a spoken and libel is a written defamation. The law has made a great difference between the two. Libel is an offence as well as a wrong, but slander is a civil wrong only. utterances are, in the absence of special ground of instification or excuse, wrongful as against any person whom they tend to bring into hatred, contempt, or Spoken words are actionable only when special damage can be proved to have been their proximate consequence, or when they convey imputations of certain kinds.

### 1. - Slander.

Slander is an actionable wrong when special damage can be shown to have followed from the utterance of the words complained of, and also in the following cases:—

Where the words impute a criminal offence.

Where they impute having a contagious disease which would cause the person having it to be excluded from society.

Where they convey a charge of unfitness, dishonesty, or incompetence in an office, profession, or trade, in short, where they manifestly tend to prejudice a man in his calling.

Spoken words which afford a cause of action without proof of special damage are said to be actionable per se.

No such distinctions exist in the case of libel: it is enough to make a written statement prima facie libellous that it is injurious to the character or credit (domestic, public, or professional) of the person concerning whom it is uttered, or in any way tends to cause nen to shun his society, or to bring him into hatred, contempt, or ridicule. When we call a statement prima

facie libellous, we do not mean that the person making it is necessarily a wrong-doer, but that he will be so held unless the statement is found to be within some recognized ground of justification or excuse.

Where "special damage" is the ground of action. the damage must be in a legal sense the natural and probable result of the words complained of. It has been said that it must also be "the legal and natural consequence of the words spoken" in this sense, that if A. speaks words in disparagement of B. which are not actionable per se, by reason of which speech C. does something to B.'s disadvantage that is itself wrongful as against B. (such as dismissing B. from his service, in breach of a subsisting contract), B. has no remedy against A., but only against C.1 But this doctrine is contrary to principle: the question is not whether C.'s act was lawful or unlawful, but whether it might have been in fact reasonably expected to result from the original act of A. And, though not directly overruled, it has been disapproved by so much and such weighty authority that we may say it is not law. There is authority for the proposition that where spoken words, defamatory but not actionable in themselves, are followed by special damage, the cause of action is not the original speaking. but the damage itself.

It is settled, however, that no cause of action is afforded by special damage arising merely from the voluntary repetition of spoken words by some hearer who was not under a legal or moral duty to repeat them. Such a consequence is deemed too remote. But if the first speaker authorized the repetition of what he said, or (it seems) spoke to or in the hearing of some one who in the performance of a legal, official, or moral duty ought to repeat it, he will be liable for the consequences.

Losing the general good opinion of one's neighbors, consortium vicinorum, as the phrase goes, is not of itself special damage. A loss of some material advantage must be shown. Yet the loss of consortium as between husband and wife is a special damage of which the law will take notice, and so is the loss of the voluntary hospitality of friends, this last on the ground that a dinner in a friend's house and at his expense is a thing of

<sup>1</sup> Vicars v. Wilcocks (1806), 8 East, 1.

some temporal value. Trouble of mind caused by defamatory words is not sufficient special damage, and illness consequent upon such trouble is too remote. "Bodily pain or suffering cannot be said to be the natural result in all persons."

Imputations of criminal offence. Words sued on as imputing crime must amount to a charge of some offence which, if proved against the party to whom it is imputed, would expose him to imprisonment or other corporal penalty (not merely to a fine in the first instance, with possible imprisonment in default of payment).

False accusation of immorality or disreputable conduct not punishable by a temporal court is not actionable per se, however gross.

Little need be said concerning imputations of contagious disease unfitting a person for society; that is, in the modern law, venereal disease. The only notable point is that "charging another with having had a contagious disorder is not actionable; for unless the words spoken impute a continuance of the disorder at the time of speaking them, the gist of the action fails."

Concerning words spoken of a man to his disparagement in his office, profession, or other business: they are actionable on the following conditions: They must be spoken of him in relation to or "in the way of" a position which he holds, or a business he carries on, at the time of speaking. They must either amount to a direct charge of incompetence or unfitness, or impute something so inconsistent with competence or fitness that, if believed, it would tend to the loss of the party's employment or husiness.

It makes no difference whether the office or profession carries with it any legal right to temporal profit, or in point of law is wholly or to some extent honorary, as in the case of a barrister or a fellow of the College of Physicians. Nor does it matter what the nature of the employment is, provided it be lawful; or whether the conduct imputed is such as in itself the law will blame or not, provided it is inconsistent with the due fulfilment of what the party, in virtue of his employment or office, has undertaken.

<sup>&</sup>lt;sup>1</sup> Leprosy and, it is said, the plague, were in the same category. Small-poz 's not. See Blake Odgers's Lib. 63.

There are cases, though not common in our books, in which a man suffers loss in his business as the intended or "natural and probable result" of words spoken in relation to that business, but not against the man's own character or conduct: as where a wife or servant dwelling at his place of business is charged with misbehavior, and the credit of the business is thereby impaired. In such a case an action lies, but is not, it seems, properly an action of slander, but rather a special action on the case analogous to those which have been allowed for disturbing a man in his calling, or in the exercise of a right in other ways.

# 2. — Defamation in general.

We now pass to the general law of defamation, which applies to both slander and libel, subject, as to slander, to the conditions and distinctions we have just gone through. Considerations of the same kind may affect the measure of damages for written defamation, though not the right of action itself.

It is commonly said that defamation to be actionable must be malicious, and the old form of pleading added "maliciously" to "falsely." Malice, however, in the modern law signifies neither more nor less, in this connection, than the absence of just cause or excuse.

"Express malice" means something different, of which hereafter.

Publication. Evil-speaking, of whatever kind, is not actionable if communicated only to the person spoken of. The cause of action is not insult, but proved or presumed injury to reputation. Therefore there must be a communication by the speaker or writer to at least one third person; and this necessary element of the wrongful act is technically called publication. It need not amount to anything like publication in the common usage of the word. That an open message passes through the hands of a telegraph clerk, or a manuscript through those of a compositor in a printing-office, is enough to constitute a publication to those persons if they are capable of understanding the matters so delivered to them. Every repeti-

tion of defamatory words is a new publication, and a distinct cause of action. The sale of a copy of a newspaper, published (in the popular sense) many years ago, to a person sent to the newspaper office by the plaintiff on purpose to buy it, is a fresh publication.

A person who is an unconscious instrument in circulating libellous matter, not knowing or having reason to believe that the document he circulates contains any such matter, is free from liability if he proves his ignorance.

On the general principles of liability, a man is deemed to publish that which is published by his authority. And the authority need not be to publish a particular form of words. A general request, or words intended and acted on as such, to take public notice of a matter, may make the speaker answerable for what is published in conformity to the general "sense and substance" of his request.

The construction of words alleged to be libellous (we shall now use this term as equivalent to "defamatory," unless the context requires us to advert to any distinction between libel and slander) is often a matter of doubt. In the first place the court has to be satisfied that they are capable of the defamatory meaning ascribed to them. Whether they are so is a question of law. If they are, and if there is some other meaning which they are also capable of, it is a question of fact which meaning they did convey under all the circumstances of the publication in question. An averment by the plaintiff that words not libellous in their ordinary meaning or without a special application, were used with a specified libellous meaning or application, is called an innuendo.

The actionable or innocent character of words depends not on the intention with which they were published, but on their actual meaning and tendency when published. A man is bound to know the natural effect of the language he uses. Words are not deemed capable of a particular meaning merely because it might by possibility be attached to them: there must be something in either the context or the cirumstances that would suggest the alleged meaning to a reasonable nind.

The publication is no less the speaker's or writer's own act, and none the less makes him answerable, because he only repeats what he has heard. Libel may consist in a fair report of statements which were actually made, and on an occasion which then and there justified the original speaker in making them; slander in the repetition of a rumor merely as a rumor, and without expressing any belief in its truth. Circumstances of this kind may count for much in assessing damages, but they count for nothing towards determining whether the defendant is liable at all.

# 3. — Exceptions.

Nothing is a libel which is a fair comment on a subject fairly open to public discussion. This is a rule of common right, not of allowance to persons in any particular situation; and it is not correct to speak of utterances protected by it as being privileged. The honesty of the critic's belief or motive is nothing to the purpose. The right is to publish such comment as in the opinion of impartial bystanders, as represented by the jury, may fairly arise out of the matter in hand. Whatever goes beyond this, even if well meant, is libellous. One test very commonly applicable is the distinction between action and motive; public acts and performances may be freely censured as to their merits or probable consequences, but wicked or dishonest motives must not be imputed upon mere surmise. Such imputations, even if honestly made, are wrongful, unless there is in fact good cause for them.

What acts and conduct are open to public comment is a question for the court, but one of judicial common sense rather than of technical definition. Subject-matter of this kind may be broadly classed under two types.

The matter may be in itself of interest to the common weal, as the conduct of persons in public offices or affairs.

Or it may be laid open to the public by the voluntary act of the person concerned. The writer of a book offered for sale, the composer of music publicly performed, the author of a work of art publicly exhibited, the manager of a public entertainment, and all who appear as performers therein, the propounder of an invention or discovery publicly described with his consent, are all deemed to submit their work to public opinion, and must take the risks of fair criticism; which criticism, being itself a public act, is in like manner open to reply within commensurate limits.

What is actually fair criticism is a question of fact, provided the words are capable of being understood in a sense beyond the fair expression of an unfavorable opinion on that which the plaintiff has submitted to the public.

In literary and artistic usage criticism is hardly allowed to be fair which does not show competent intelligence of the subject-matter. Courts of justice have not the means of applying so fine a test: and a right of criticism limited to experts would be no longer a common right but a privilege.

The right of fair criticism will, of course, not cover untrue statements of alleged specific acts of misconduct.

Defamation is not actionable if the defendant shows that the defamatory matter was true; and if it was so, the purpose or motive with which it was published is irrelevant.

What the defendant has to prove is truth in substance, that is, he must show that the imputation made or repeated by him was true as a whole and in every material part thereof. What parts of a statement are material, in the sense that their accuracy or inaccuracy makes a sensible difference in the effect of the whole, is a question of fact.

There may be a further question whether the matter alleged as justification is sufficient, if proved, to cover the whole cause of action arising on the words complained of; and this appears to be a question of law, save so far as it depends on the fixing of that sense, out of two or more possible ones, which those words actually conveyed.

Apparently it would make no difference in law that the defendant had made a defamatory statement without any belief in its truth, if it turned out afterwards to have been true when made: as, conversely, it is certain that the most honest and even reasonable belief is of itself no justification.

In order that public duties may be discharged without fear,

unqualified protection is given to language used in the exercise of parliamentary and judicial functions. A member of Parliament cannot be lawfully molested outside Parliament by civil action, or otherwise, on account of anything said by him in his place in either House. An action will not lie against a judge for any words used by him in his judicial capacity in a court of justice. It is not open to discussion whether the words were or were not in the nature of fair comment on the matter in hand, or otherwise relevant or proper, or whether or not they were used in good faith.

Parties, advocates, and witnesses in a court of justice are under the like protection. The only limitation is that the words must in some way have reference to the inquiry the court is engaged in.

A duly constituted military court of inquiry is for this purpose on the same footing as an ordinary court of justice. So is a select committee of the House of Commons. Statements coming within this rule are said to be "absolutely privileged."

The term "qualified privilege" is often used to mark the requirement of good faith in cases in which a middle course is taken between the common rule of unqualified responsibility for one's statements, and the exceptional rules which give, as we have just seen, absolute protection to the kinds of statements covered by them. Fair reports of judicial and parliamentary proceedings are put by the latest authorities in this category. Such reports must be fair and substantially correct in fact, to begin with, and also must not be published from motives of personal ill-will; and this although the matter reported was "absolutely privileged" as to the original utterance of it.

The conditions of immunity may be thus summed up:—

The occasions must be privileged; and if the defendant establishes this, he will not be liable unless the plaintiff can prove that the communication was not honestly made for the purpose of discharging a legal, moral, or social duty, or with a view to the just protection of some private interest or of the public good by giving information appearing proper to be given, but from some improper motive and without due regard to truth.

The law, it is said, presumes or implies malice in all cases of defamatory words; this presumption may be rebutted by showing that the words were uttered on a privileged occasion; but after this the plaintiff may allege and prove express or actual malice, that is, wrong motive. He need not prove malice in the first instance, because the law presumes it; when the presumption is removed, the field is still open to proof.

The occasions giving rise to privileged communications may be in matters of legal or social duty, as where a confidential report is made to an official superior, or in the common case of giving a character to a servant; or they may be in the way of self-defence, or the defence of an interest common to those between whom the words or writing pass; or they may be addressed to persons in public authority with a view to the exercise of their authority for the public good; they may also be matter published in the ordinary sense of the word for purposes of general information.

As to occasions of private duty; the result of the authorities appears to be that any state of facts making it right in the interests of society for one person to communicate to another what he believes or has heard regarding any person's conduct or character will constitute a privileged occasion.

Answers to confidential inquiries, or to any inquiries made in the course of affairs for a reasonable purpose, are clearly privileged. So are communications made by a person to one to whom it is his especial duty to give information by virtue of a standing relation between them, as by a solicitor to his client about the soundness of a security, by a father to his daughter of full age about the character and standing of a suitor, and the like. Statements made without request and apart from any special relation of confidence may or may not be privileged according to the circumstances; but it cannot be prudently assumed that they will be.

Examples of privileged communications in self-protection, or the protection of a common interest, are a warning given by a master to his servants not to associate with a former rellow-servant whom he has discharged on the ground of dishonesty;

a letter from a creditor of a firm in liquidation to another of the creditors, conveying information and warning as to the conduct of a member of the debtor firm in its affairs. The holder of a public office, when an attack is publicly made on his official conduct, may defend himself with the like publicity.

Communications addressed in good faith to persons in a public position for the purpose of giving them information to be used for the redress of grievances, the punishment of crime, or the security of public morals, are in like manner privileged, provided the subject-matter is at least reasonably believed to be within the competence of the person addressed.

Fair reports (as distinguished from comment) are a distinct class of publications enjoying the protection of "qualified privilege" to the extent to be mentioned. The fact that imputations have been made on a privileged occasion will, of course, not exempt from liability a person who repeats them on an occasion not privileged. Even if the original statement be made with circumstances of publicity, and be of the kind known as "absolutely privileged," it cannot be stated as a general rule that republication is justifiable. Certain specific immunities have been ordained by modern decisions and statutes. They rest on particular grounds, and are not to be extended. Matter not coming under any of them must stand on its own merits, if it can, as a fair comment on a subject of public interest.

Fair reports of parliamentary and public judicial proceedings are treated as privileged communications. In the case of judicial proceedings it is immaterial whether they are preliminary or final, and, according to the prevailing modern opinion, whether contested or ex parte, and also whether the court actually has jurisdiction or not, provided that it is acting in an apparently regular manner. The report need not be a report of the whole proceedings. The rule does not extend to justify the reproduction of matter in itself obscene, or otherwise unfit for general publication, or of proceedings of which the publication is forbidden by the court in which they took place.

An ordinary newspaper report furnished by a regular reporter is all but conclusively presumed, if in fact fair and sub-

<sup>1</sup> See stat. 8 & 4 Vict. c. 9.

stantially correct, to have been published in good faith; but an outsider who sends to a public print even a fair report of judicial proceedings containing personal imputations invites the question whether he sent it honestly for purposes of information, or from a motive of personal hostility; if the latter is found to be the fact, he is liable to an action.

In the case of privileged communications of a confidential kind, the failure to use ordinary means of insuring privacy—as if the matter is sent on a post-card instead of in a sealed letter, or telegraphed without evident necessity—will destroy the privilege; either as evidence of malice, or because it constitutes a publication to persons in respect of whom there was not any privilege at all. The latter view seems on principle the better one.

Where the existence of a privileged occasion is established, the plaintiff must give affirmative proof of malice, that is, a dishonest personal ill-will, in order to succeed. It is not for the defendant to prove that his belief was founded on reasonable grounds. To constitute malice there must be something more than the absence of reasonable ground for belief in the matter communicated. That may be evidence of reckless disregard of truth, but is not always even such evidence. A man may be honest and yet unreasonably credulous; or it may be proper for him to communicate reports or suspicions which he himself does not believe. In either case he is within the protection of the rule.

### CHAPTER VIII.

#### WRONGS OF FRAUD AND MALICE.

## 1. - Deceit.

The wrong called Deceit consists in leading a man into damage by wilfully or recklessly causing him to believe and act on a falsehood. It is a cause of action by the common law (the action being an action on the case founded on the

ancient writ of deceit), and it has likewise been dealt with by courts of equity under the general jurisdiction of the Chancery in matters of fraud. The principles worked out in the two jurisdictions are believed to be identical, though there may be a theoretical difference as to the character of the remedy, which in the Court of Chancery did not purport to be damages but restitution.

To create a right of action for deceit there must be a statement made by the defendant, or for which he is answerable as principal, and with regard to that statement all the following conditions must concur:—

- (a) It is untrue in fact.
- (b) The person making the statement, or the person responsible for it, either knows it to be untrue, or is culpably ignorant (that is, reckless or careless) whether it be true or not.
- (c) It is made to the intent that the plaintiff shall act upon it, or in a manner apparently fitted to induce him to act upon it.
- (d) The plaintiff does act in reliance on the statement in the manner contemplated or manifestly probable, and thereby suffers damage.

There is no cause of action without actual damage, or the damage is the gist of the action.

And according to the general principles of civil liability, the damage must be the natural and probable consequence of the plaintiff's action on the faith of the defendant's statement.

(e) The statement must be in writing and signed, in one class of cases, namely, where it amounts to a guaranty; but this requirement is statutory, and did not apply to the Court of Chancery.

Of these heads in order.

(a) A statement can be untrue in fact only if it purports to state matter of fact. A promise is distinct from a statement of fact, and breach of contract, whether from want of power or of will to perform one's promise, is a different thing

from deceit. Again, a mere statement of opinion or inference, the facts on which it purports to be founded being notorious or equally known to both parties, is different from a statement importing that certain matters of fact are within the particular knowledge of the speaker. In particular cases, however, it may be hard to draw the line between a mere expression of opinion and an assertion of specific fact. And a man's intention or purpose at a given time is in itself a matter of fact, and capable (though the proof be seldom easy) of being found as a fact. The vendor of goods can rescind the contract on the ground of fraud if he discovers within due time that the buyer intended not to pay the price.

When a prospectus is issued to shareholders in a company or the like to invite subscriptions to a loan, a statement of the purposes for which the money is wanted is a material statement of fact, and if untrue may be ground for an action of deceit.

A representation concerning a man's private rights, though it may involve matters of law, is as a whole deemed to be a statement of fact. A statement about the existence or actual text of a public Act of Parliament, or a reported decision, would seem to be a statement of fact. With regard to statements of matters of general law made only by implication, or statements of pure propositions of the law, the rule may perhaps be this, that in dealings between parties who have equal means of ascertaining the law, the one will not be presumed to rely upon a statement of matter of law made by the other.

(b) As to the knowledge and belief of the person making the statement.

He may believe it to be true. In that case he incurs no liability, nor is he bound to show that his belief was founded on such grounds as would produce the same belief in a prudent and competent man, except so far as the absence of reasonable cause may tend to the inference that there was not any real belief.

If, having honestly made a representation, a man discovers that it is not true before the other party has acted upon it, the representation must be taken to be continuously made until it is acted upon, so that from the moment the party making it discovers that it is false, and having the means of communicating the truth to the other party omits to

do so, he is, in point of law, making a false representation with knowledge of its untruth.

The same rule holds if the representation was true when first made, but ceases to be true by reason of some event within the knowledge of the party making it, and not within the knowledge of the party to whom it is made.

On the other hand if a man states as fact what he does not believe to be fact, he speaks at his peril; and this whether he knows the contrary to be true or has no knowledge of the matter at all, for the pretence of having certain information which he has not is itself a deceit.

With regard to transactions in which a more or less stringent duty of giving full and correct information (not merely of abstaining from falsehood or concealment equivalent to falsehood) is imposed on one of the parties, it may be doubted whether an obligation of this kind annexed by law to particular classes of contracts can ever be treated as independent of contract. If a misrepresentation by a vendor of real property, for example, is wilfully or recklessly false, it comes within the general description of deceit. But there are errors of mere inadvertence which constantly suffice to avoid contracts of these kinds, and in such cases I do not think an action for deceit (or the analogous suit in equity) is known to have been maintained. As regards these kinds of contracts, therefore — but, it is submitted, these only - the right of action for misrepresentation as a wrong is not co-extensive with the right of rescission. In some cases compensation may be recovered as an exclusive or alternative remedy, but on different grounds, and subject to the special character and terms of the contract.

The qualification of the rule that the defendant must be shown not to have believed the truth of his assertion (if it really be a qualification) is that a person cannot excuse himself for misrepresenting material facts which have been specially within his own knowledge, and of which he is the proper person to give information, by alleging that at the moment he forgot the true state of things. It is a trustee's business to know whether or not he has had notice of a prior incumbrance, a lessor's business to know whether or not he has already granted a lease.

(c) It is not a necessary condition of liability that the misrepresentation complained of should have been made directly to the plaintiff, or that the defendant should have intended or desired any harm to come to him. It is enough that the representation was intended for him to act upon, and that he has acted in the manner contemplated, and suffered damage which was a natural and probable consequence.

A statement circulated or published in order to be acted on by a certain class of persons, or at the pleasure of any one to whose hands it may come, is deemed to be made to that person who acts upon it, though he may be wholly unknown to the issuer of the statement.

(d) As to the plaintiff's action on the faith of the defendant's representation.

A. by words or acts represents to B. that a certain state of things exists, in order to induce B. to act in a certain way. The simplest case is where B., relying wholly on A.'s statement, and having no other source of information, acts in the manner contemplated. This needs no further comment. The case of B. disbelieving and rejecting A.'s assertion is equally simple.

Another case is that A.'s representation is never communicated to B. Here, though A. may have intended to deceive B., it is plain that he has not deceived him; and an unsuccessful attempt to deceive, however unrighteous it may be, does not cause damage, and is not an actionable wrong.

Another case is where the plaintiff has at hand the means of testing the defendant's statement, indicated by the defendant himself, or otherwise within the plaintiff's power, and either does not use them or uses them in a partial and imperfect manner. One who chooses, however, to make positive assertions without warrant shall not excuse himself by saying that the other party need not have relied upon them. He must show that his representation was not in fact relied upon.

And the same principle applies as long as the party substantially puts his trust in the representation made to him, even if he does use some observation of his own.

A cursory view of a house, asserted by the vendor to be in good repair, does not preclude the purchaser from complaining of substantial defects in repair which he afterwards discovers.

In short, nothing will excuse a culpable misrepresentation short of proof that it was not relied on, either because the other party knew the truth, or because he relied wholly on his own investigation, or because the alleged fact did not influence his action at all. And the burden of this proof is on the person who has been proved guilty of material misrepresentation.

Difficulties may arise on the construction of the statement alleged to be deceitful. Of course a man is responsible for the obvious meaning of his assertions; but where the meaning is obscure, it is for the party complaining to show that he relied upon the words in a sense in which they were false and misleading, and of which they were fairly capable.

(e) A false representation may at the same time be a promise such as to amount to, or to be in the nature of, a guaranty. Now, by the Statute of Frauds, a guaranty cannot be sued on as a promise unless it is in writing and signed by the party to be charged or his agent. If an oral guaranty could be sued on in tort, by treating it as a fraudulent affirmation instead of a promise, the statute might be largely evaded. By Lord Tenterden's Act, the following provision was made:

"No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith."

False representations made by an agent on account of his principal. Bearing in mind that reckless ignorance is equivalent to guilty knowledge, we may state the alternatives to be considered as follows:—

The principal knows the representation to be false and authorizes the making of it. Here, the principal is clearly liable; the agent is or is not liable according as he does not or does himself believe the representation to be true.

The principal knows the contrary of the representation to be true, and it is made by the agent in the general course of his employment but without specific authority.

Here, if the agent does not believe his representation to be true, he commits a fraud in the course of his employment and for the principal's purposes, and the principal is liable.

If the agent does believe the representation to be true, there is a difficulty; for the agent has not done any wrong and the principal has not authorized any. Yet the other party's damage is the same. That he may rescind the contract, if he has been misled into a contract, may now be taken as settled law. But what if there was not any contract, or rescission has become impossible? Has he a distinct ground of action, and if so how? We think that an action lies against the principal; whether properly to be described, under common-law forms of pleading, as an action for deceit, or as an analogous but special action on the case, there is no occasion to consider.

On the other hand an honest and prudent agent may say, "To the best of my own belief such and such is the case," adding in express terms or by other clear indication—"but I have no information from my principal." Here there is no ground for complaint, the other party being fairly put on inquiry.

If the principal does not expressly authorize the representation, and does not know the contrary to be true, but the agent does, the representation being in a matter within the general scope of his authority, the principal is liable, as he would be for any other wrongful act of an agent about his business. This liability equally holds when the principal is a corporation.

The hardest case that can be put for the principal, and by no means an impossible one, is that the principal authorizes a specific statement which he believes to be true, and which at the time of giving the authority is true; before the agent has executed his authority the facts are materially changed to the knowledge of

the agent, but unknown to the principal; the agent conceals this from the principal, and makes the statement as originally authorized. The necessary and sufficient condition of the master's responsibility is that the act or default of the servant or agent belonged to the class of acts which he was put in the master's place to do, and was committed for the master's purposes. And "no sensible distinction can be drawn between the case of fraud and the case of any other wrong."

### 2. - Slander of Title.

The wrong called Slander of Title is in truth a special variety of deceit, which differs from the ordinary type in that third persons, not the plaintiff himself, are induced by the defendant's falsehood to act in a manner causing damage to the plaintiff. An action for this cause is "an action on the case for special damage sustained by reason of the speaking or publication of the slander of the plaintiff's title." Also, the wrong is a malicious one in the only proper sense of the word, that is, absence of good faith is an essential condition of liability; or actual malice, no less than special damage, is of the gist of the action.

A disparaging statement concerning a man's title to use an invention, design, or trade name, or his conduct in the matter of a contract, may amount to a libel or slander on him in the way of his business: in other words, the special wrong of slander of title may be included in defamation, but it is evidently better for the plaintiff to rely on the general law of defamation if he can, as thus he escapes the troublesome burden of proving malice.

The protection of trade-marks and trade names was originally undertaken by the courts on the ground of preventing fraud. But the right to a trade-mark, after being more and more assimilated to proprietary rights, has [in England] become a stautory franchise analogous to patent rights and copyright; and in the case of a trade name, although the use of a similar name cannot be complained of unless it is shown to have a tendency to deceive customers, yet the tendency is enough; the plaintiff is not

bound to prove any fraudulent intention or even negligence against the defendant.

### 3. — Malicious Prosecution and Abuse of Process.

"In an action for malicious prosecution the plaintiff has to prove, first, that he was innocent, and that his innocence was pronounced by the tribunal before which the accusation was made; secondly, that there was a want of reasonable and probable cause for the prosecution, and lastly, that the proceedings of which he complains were initiated in a malicious spirit, that is, from an indirect and improper motive, and not in furtherance of justice." And the plaintiff's case fails if his proof fails at any one of these points.

It has been doubted whether an action for malicious prosecution will lie against a corporation. It seems, on principle, that such an action will lie if the wrongful act was done by a servant of the corporation in the course of his employment and in the company's supposed interest, and it has been so held, but there are dicta to the contrary.

"In the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution."

But there are proceedings which, though civil, are not ordinary actions, and fall within the reason of the law which allows an action to lie for the malicious prosecution of a criminal charge. That reason is that prosecution on a charge "involving either scandal to reputation, or the possible loss of liberty to the person," necessarily and manifestly imports damage. Thus, the commencement of proceedings in bankruptcy against a trader, if instituted without reasonable and probable cause and with malice, is an actionable wrong. In common-law jurisdictions, where a suit can be commenced by arrest of the defendant or attachment of his property, the same rule will apply.

### 4. — Other Malicious Wrongs.

The modern action for malicious prosecution has taken the place of the old writ of conspiracy and the action on the case grounded thereon, out of which it seems to have developed. Whether conspiracy is known to the law as a substantive wrong, or in other words, whether two or more persons can ever be joint wrong-doers, and liable to an action as such, by doing in execution of a previous agreement something it would not have been unlawful for them to do without such agreement, is a question of mixed history and speculation not wholly free from doubt. It seems to be the better opinion that the conspiracy or "confederation" is not in any case the gist of the action, but is only matter of inducement or evidence. Either the wrongful acts by which the plaintiff has suffered were such as one person could not commit alone, say a riot, or they were wrongful because malicious, and the malice is proved by showing that they were done in execution of a concerted design. In the singular case of Gregory v. Duke of Brunswick,1 the action was in effect for hissing the plaintiff off the stage of a theatre in pursuance of a malicious conspiracy between the defendants. The court were of opinion that in point of law the conspiracy was material only as evidence of malice, but that in point of fact there was no other such evidence, and therefore the jury were rightly directed that without proof of it the plaintiff's case must fail.

Soon after this case was dealt with by the Court of Common Pleas in England, the Supreme Court of New York<sup>2</sup> laid it down that conspiracy is not in itself a cause of action.

There may be other malicious injuries not capable of more specific definition "where a violent or malicious act is done to a man's occupation, profession, or way of getting a livelihood;" as where the plaintiff is owner of a decoy for catching wild-fowl, and the defendant, without entering on the plaintiff's land, wilfully fires off guns near to the decoy, and frightens wild-fowl away from it.

Generally speaking, every wilful interference with the exercise of a franchise is actionable without regard

<sup>&</sup>lt;sup>1</sup> 6 Man. & Gr. 205, 953.

<sup>&</sup>lt;sup>2</sup> Hutchins v. Hutchins (1845), 7 Hill, 104; and Bigelow, L. C. 207.

to the defendant's act being done in good faith, by reason of a mistaken notion of duty or claim of right, or being consciously wrongful.

The wrong of maintenance, or aiding a party in litigation, without either interest in the suit, or lawful cause of kindred, affection, or charity for aiding him, is akin to malicious prosecution and other abuses of legal process; but the ground of it is not so much an independent wrong as particular damage resulting from "a wrong founded upon a prohibition by statute"—a series of early statutes said to be in affirmation of the common law—"which makes it a criminal act and a misdemeanor." Hence it seems that a corporation cannot be guilty of maintenance. Actions for maintenance are in modern times rare though possible; and the recent decision of the Court of Appeal that mere charity, with or without reasonable ground, is an excuse for maintaining the suit of a stranger, does not tend to encourage them.

### CHAPTER IX.

WRONGS TO POSSESSION AND PROPERTY.

1. — Duties regarding Property generally.

Every kind of intermeddling with anything which is the subject of property is a wrong, unless it is either authorized by some person entitled to deal with the thing in that particular way, or justified by authority of law, or (in some cases but by no means generally) excusable on the ground that it is done under a reasonable though mistaken supposition of lawful title or authority. Broadly speaking, we touch the property of others at our peril, and honest mistake in acting for our own interest, or even an honest intention to act for the benefit of the true owner, will avail us nothing if we transgress.

The forms of action at the common law brought not Ownership but Possession to the front.—An owner in possession was protected against disturbance, but the rights of an owner out of possession were obscure and weak. To this day it continues so with regard to chattels. For many purposes the "true owner" of goods is the person, and only the person, entitled to immediate possession. Regularly the common law protects ownership only through possessory rights and remedies.

It must be known who is in legal possession of any given subject of property, and who is entitled to possess it, before we can tell what wrongs are capable of being committed, and against whom, by the person having physical control over it, or by others. Legal possession does not necessarily coincide either with actual physical control or the present power thereof (the "detention" of Continental terminology), or with the right to possess (constantly called "property" in our books); and it need not have a rightful origin. The separation of detention, possession in the strict sense, and the right to possess, is both possible and frequent.

Trespass is the wrongful disturbance of another person's possession of land or goods. Therefore it cannot be committed by a person who is himself in possession, though in certain exceptional cases a dispunishable or even a rightful possessor of goods may by his own act, during a continuous physical control, make himself a mere trespasser. But a possessor may do wrong in other ways. He may commit waste as to the land he holds, or he may become liable to an action of ejectment by holding over after his title or interest is determined. As to goods, he may detain them without right after it has become his duty to return them, or he may convert them to his own use.

Thus we have two kinds of duty, namely, to refrain from meddling with what is lawfully possessed by another, and to refrain from abusing possession which we have lawfully gotten under a limited title; and the breach of these produces distinct kinds of wrong, having their appropriate remedies. On the one hand the remedies of an actual possessor were by the common law freely accorded to persons who had only the right to possess; on the other hand the person wronged was constantly allowed at his option to proceed against a mere trespasser as if the trespasser had only abused a lawful or at any rute excusable possession.

In the later history of common law pleading trespass and conversion became largely, though not wholly, interchangeable. Detinue, the older form of action for the recovery of chattels, was not abolished, but it was generally preferable to treat the detention as a conversion and sue in trover, so that trover practically superseded detinue.

### 2. — Trespass.

Trespass may be committed by various kinds of acts, of which the most obvious are entry on another's land (trespass quare clausum fregit), and taking another's goods (trespass de bonis asportatis).

Neither the use of force, nor the breaking of an enclosure or transgression of a visible boundary, nor even an unlawful intention, is necessary to constitute an actionable trespass. It is likewise immaterial, in strictness of law, whether there be any actual damage or not. "Every invasion of private property, be it ever so minute. is a trespass."

It has been doubted whether it is a trespass to pass over land without touching the soil, as one may in a balloon, or to cause a material object, as shot fired from a gun, to pass over it; but the better opinion is that such acts are trespasses.

Clearly there can be a wrongful entry on land below the surface, as by mining.

Trespass by a man's cattle is dealt with exactly like trespass by himself

Trespass to goods may be committed by taking possession of them, or by any other act "in itself immediately injurious" to the goods in respect of the possessor's interest, as by killing, beating, or chasing animals, or defacing a work of art. Where the possession is changed the trespass is an asportation, and may amount to the offence of theft. Other trespasses to goods may be criminal offences under the head of malicious injury to property.

# 3. - Injuries to Reversion.

A person in possession of property may do wrong by refusing to deliver possession to a person entitled, or by otherwise assuming to deal with the property as owner or adversely to the true owner, or by dealing with it under color of his real possessory title but in excess of his rights, or, where the nature of the object admits of it, by acts amounting to destruction or total change of character.

The law started from entirely distinct conceptions of the mere detaining of property from the person entitled, and the spoiling or altering it to the prejudice of one in reversion or remainder, or a general owner. For the former case the common law provided its most ancient remedies — the writ of right (and later the various assizes and the writ of entry) for land, and the parallel writ of detinue (parallel as being merely a variation of the writ of debt, which was precisely similar in form to the writ of right) for goods; to this must be added, in special, but once frequent and important cases, replevin. For the latter the writ of waste (as extended by the Statutes of Marlbridge and Gloucester) was available as to land; later this was supplanted by an action on the case "in the nature of waste," and in modern times the powers and remedies of courts of equity have been found still more effectual.

Owners of chattels were helped by an action on the case, which became a distinct species under the name of trover, which alleged that the defendant found the plaintiff's goods and converted them to his own use. The original notion of conversion in personal chattels answers closely to that of waste in tenements; but it was soon extended so as to cover the whole ground of detinue, and largely overlap trespass; a mere trespasser, whose acts would have amounted to conversion if done by a lawful possessor, not being allowed to take exception to the true owner "waiving the trespass," and professing to assume in the defendant's favor that his possession had a lawful origin.

#### 4. - Waste.

Waste is any unauthorized act of a tenant for a freehold estate not of inheritance, or for any lesser interest, which tends to the destruction of the tenement, or otherwise to the injury of the inheritance. "In order to prove waste you must prove an injury to the inheritance," either "in the sense of value" or "in the sense of destroying identity." And in the United States, especially the Western States, many acts are held to be only in a natural and reasonable way of using and improving the land—clearing wild woods, for example—which in England, or even in the Eastern States, would be manifest waste.

As to permissive waste, i.e., suffering the tenement to lose its value or go to ruin for want of necessary repair, a tenant for life or years is liable therefor if an express duty to repair is imposed upon him by the instrument creating his estate; otherwise it is doubtful. It seems that it can in no case be waste to use a tenement in an apparently reasonable and proper manner, "having regard to its character and to the purposes for which it was intended to be used," whatever the actual consequences of such user may be.

In modern practice, questions of waste arise either between a tenant for life and those in remainder, or between landlord and tenant. In the former case, the unauthorized cutting of timber is the most usual ground of complaint; in the latter, the forms of misuse or neglect are as various as the uses, agricultural, commercial, or manufacturing, for which the tenement may be let and occupied.

A tenant for life whose estate is expressed to be without impeachment of waste may freely take timber and minerals for use, but, unless with further specific authority, he must not remove timber planted for ornament (save so far as the cutting of part is required for the preservation of the rest), open a mine in a garden or pleasure-ground, or do like acts destructive to the individual character and amenity of the dwelling-place. The commission of such waste may be restrained by injunction, without regard to pecuniary damage to the inheritance; but, when it is once committed, the normal measure of damages can only be the actual loss of value.

As between landlord and tenant the real matter in dispute, in a case of alleged waste, is commonly the extent of the

tenant's obligation, under his express or implied covenants, to keep the property demised in safe condition or repair.

#### 5. — Conversion.

Conversion, according to recent authority, may be described as the wrong done by "an unauthorized act which deprives another of his property permanently or for an indefinite time." Such an act may or may not include a trespass; whether it does or not is immaterial as regards the right of the plaintiff in a civil action, for he may "waive the trespass."

The "property" of which the plaintiff is deprived must be something which he has the immediate right to possess. But an owner not entitled to immediate possession might have a special action on the case, not being trover, for any permanent injury to his interest, though the wrongful act might also be a trespass, conversion, or breach of contract as against the immediate possessor.

The grievance of conversion is the unauthorised assumption of the powers of the true owner. Actually dealing with another's goods as owner for however short a time and however limited a purpose is therefore conversion; so is an act which in fact enables a third person to deal with them as owner, and which would make such dealing lawful only if done by the person really entitled to possess the goods. It makes no difference that such acts were done under a mistaken but honest and even reasonable supposition of being lawfully entitled, or even with the intention of benefiting the true owner; nor is a servant excused for assuming the dominion of goods on his master's behalf, though he "acted under an unavoidable ignorance and for his master's benefit."

A referral to deliver possession to the true owner on demand is commonly said to be evidence of a conversion, but evidence only. "If the refusal is in disregard of the plaintiff's title, and for the purpose of claiming the goods either for the defendant or for a third person, it is a conversion."

But the refusal may be a qualified and provisional one: the possessor may say, "I am willing to do right, but that I may be sure I am doing right, give me reasonable proof that you are the true owner;" and such a possessor, even if over-cautious in the amount of satisfaction he requires, can hardly be said to repudiate the true owner's claim. "An unqualified refusal is almost always conclusive evidence of a conversion; but if there be a qualification annexed to it, the question then is whether it be a reasonable one."

By a conversion the true owner is, in contemplation of law, totally deprived of his goods; therefore, except in a few very special cases, the measure of damages in an action of trover was the full value of the goods, and by a satisfied judgment for the plaintiff, the property in the goods, if they still existed in specie, was transferred to the defendant.

The mere assertion of a pretended right to deal with goods or threatening to prevent the owner from dealing with them is not conversion, though it may perhaps be a cause of action, if special damage can be shown.

An attempted sale of goods which does not affect the property, the seller having no title and the sale not being in market overt, nor yet the possession, there being no delivery, is not a conversion. But if a wrongful sale is followed up by delivery, both the seller and the buyer are guilty of a conversion.

A merely ministerial dealing with goods, at the request of an apparent owner having the actual control of them, appears not to be conversion.

Acts of servants. There appears to be nothing in the authorities to prevent it from being excusable to deal with goods merely as the servant or agent of an apparent owner in actual possession, or under a contract with such owner, according to the apparent owner's direction; neither the act done nor the contract (if any) purporting to involve a transfer of the supposed property in the goods, and the ostensible owner's direction being one which he could lawfully give if he were really entitled to his apparent interest, and being obeyed in the honest belief that he is so entitled.

A bailee is prima facie estopped, as between himself and the bailor, from disputing the bailor's title. Hence, as he cannot be liable to two adverse claimants at once, he is also justified in redelivering to the bailor in pursuance of his employment, so long as he has not notice (or rather is not under the effective pressure) of any paramount claim; it is only when he is in danger of such a claim that he is not bound to redeliver to the bailor.

Where a bailee has an interest of his own in the goods (as in the common cases of hiring and pledge), and under color of that interest deals with the goods in excess of his right, such dealing will not be the wrong of conversion unless the possessor's dealing is "wholly inconsistent with the contract under which he had the limited interest;" as if a hirer, for example, destroys or sells the goods.

The case of a common-law lien, which gives no power of disposal at all, is different; there the holder's only right is to keep possession until his claim is satisfied. If he parts with possession, his right is gone and his attempted disposal merely wrongful, and therefore he is liable for the full value.

A mortgagor having the possession and use of goods under covenants entitling him thereto for a certain time, determinable by default after notice, is virtually a bailee for a term, and, like bailees in general, may be guilty of conversion by an absolute disposal of the goods; and so may assignees claiming through him with no better title than his own.

## 6. — Injuries between Tenants in Common.

As between tenants in common of either land or chattels there cannot be trespass unless the act amounts to an actual ouster, i. e., dispossession. Short of that, "trespass will not lie by the one against the other, so far as the land is concerned."

In the same way acts of legitimate use of the common property cannot become a conversion through subsequent misappropriation, though the form in which the property exists

may be wholly converted, in a wider sense, into other forms. There is no wrong to the co-tenant's right of property until there is an act inconsistent with the enjoyment of the property by both. For every tenant or owner in common is equally entitled to the occupation and use of the tenement or property; he can therefore become a trespasser only by the manifest assumption of an exclusive and hostile possession. Acts which involve the destruction of the property held in common, such as digging up and carrying away the soil, are deemed to include ouster.

## 7. - Extended Protection of Possession.

Trespass and other violations of possessory rights can be committed not only against the person who is lawfully in possession, but against any person who has legal possession, whether rightful in its origin or not, so long as the intruder cannot justify his act under a better title. A mere stranger cannot be heard to say that one whose possession he has violated was not entitled to possess. Unless and until a superior title or justification is shown, existing legal possession is not only presumptive but conclusive evidence of the right to The practical result is that an outstanding claim of a third party (jus tertii, as it is called) cannot be set up to excuse either trespass or conversion: "against a wrongdoer, possession is a title." As regards real property, a possession commencing by trespass can be defended against a stranger not only by the first wrongful occupier, but by those claiming through him. The rule is in aid of de facto possession only. It will not help a claimant who has been in possession, but has been dispossessed in a lawful manner and has not any right to possess.

Again, as de facto possession is thus protected, so de jure possession—if by that term we may designate an immediate right to possess when separated from actual legal possession—was even under the old system of pleading invested with the benefit of strictly possessory remedies: that is, an owner who had parted with possession, but was entitled to resume it at will, could sue in trespass for a disturbance by a stranger. Such is the case of a landlord where the tenancy is at will, or of a bailor

where the bailment is revocable at will, or on a condition that can be satisfied at will. In this way the same act may be a trespass both against the actual possessor and against the person entitled to resume possession.

Derivative possession is equally protected, through whatever number of removes it may have to be traced from the owner in possession, who (by modern lawyers at any rate) is assumed as the normal root of title.

One who receives possession from a trespasser, even with full knowledge, does not himself become a trespasser against the true owner, as he has not violated an existing lawful possession. The old law of real property was even more favorable to persons claiming through a disseisor; but at the present day the old forms of action are almost everywhere abolished; and it is quite certain that the possessor under a wrongful title, even if he is himself acting in good faith, is by the common law liable in some form to the true owner, and in the case of goods must submit to recapture if the owner can and will retake them.

## 8. - Wrongs to Easements, etc.

Easements and other incorporeal rights in property, "rather a fringe to property than property itself," as they have been called, are not capable in an exact sense of being possessed. The enjoyment which may in time ripen into an easement is not possession, and gives no possessory right before the due time is fulfilled: "a man who has used a way ten years without title cannot sue even a stranger for stopping it." The only possession that can come in question is the possession of the dominant tenement itself, the texture of legal rights and powers to which the "fringe" is incident. Nevertheless disturbance of easements and the like, as completely existing rights of use and enjoyment, is a wrong in the nature of trespass, and remediable by action without any allegation or proof of specific damage; the action was on the case under the old forms of pleading.

Franchises and incorporeal rights of the like nature, as patent and copyrights, present something more akin to possession, for their essence is exclusiveness. But the same remark applies; in almost every disputed case the question is of defining the right itself, or the conditions of the right; and de facto enjoyment does not even provisionally create any substantive right, but is material only as an incident in the proof of title.

## 9. - Grounds of Justification and Excuse.

Acts of interference with land or goods may be justified by the consent of the occupier or owner; or they may be justified or excused by the authority of the law. That consent which, without passing any interest in the property to which it relates, merely prevents the acts for which consent is given from being wrongful, is called a license. There may be licenses not affecting the use of property at all, and on the other hand a license may be so connected with the transfer of property as to be in fact inseparable from it.

"A dispensation or license properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful, which without it had been unlawful. As a license to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which without license had been unlawful. But a license to hunt in a man's park and carry away the der killed to his own use, to cut down a tree in a man's ground, and to carry it away the next day after to his own use, are licenses as to the acts of hunting and cutting down the tree, but as to the carrying away of the deer killed and tree cut down they are grants."

Generally speaking, a license is a mere voluntary suspension of the licensor's right to treat certain acts as wrongful, and is revoked by signifying to the licensee that it is no longer his will to allow those acts. The revocation of a license is in itself no less effectual though it may be a breach of contract. If the owner of land or a building admits people there to on payment, as spectators of an entertainment or the like, it may be a breach of contract to require a person who has duly paid his money and entered to go out, but a person so required has no title to stay, and if he persists in staying he is a trespasser. His only right is to sue on the contract: when, indeed, he may get an

injunction, and so be indirectly restored to the enjoyment of the license. But if a license is part of a transaction whereby a lawful interest in some property, besides that which is the immediate subject of the license, is conferred on the license, and the license is necessary to his enjoyment of that interest, the license is said to be "coupled with an interest," and cannot be revoked until its purpose is fulfilled: nay more, where the grant obviously cannot be enjoyed without an incidental license, the law will annex the necessary license to the grant.

The grant or revocation of a license may be either by express words or by any act sufficiently signifying the licensor's will; if a man has leave and license to pass through a certain gate, the license is as effectually revoked by locking the gate as by a formal notice.

A license, being only a personal right—or rather a waiver of the licensor's rights—is not assignable, and confers no right against any third person. If a so-called license does operate to confer an exclusive right capable of being protected against a stranger, it must be that there is more than a license, namely, the grant of an interest or easement.

Justification by authority of the law is of two kinds :-

- 1. In favor of a true owner against a wrongful possessor; under this head come re-entry on land and retaking of goods.
- 2. In favor of a paramount right conferred by law against the rightful possessor; which may be in the execution of legal process, in the assertion or defence of private right, or in some cases by reason of necessity.

A person entitled to the possession of lands or tenements does no wrong to the person wrongfully in possession by entering upon him; and it is said that by the old common law he might have entered by force. But forcible entry is an offence under the statute of 5 Ric. II. (A.D. 1381), which provided that "none from henceforth make any entry into any lands and tenements but in case where entry is given by the law, and in such case not with strong hand nor with multitude of people, but only in peaceable and easy [the true reading of the

Parliament Roll appear to be 'lisible, aisee, and peisible'] manner." This statute is still in force here, and "has been re-enacted in the several American States, or recognized as a part of the common law. The offence is equally committed whether the person who enters by force is entitled to possession or not, but opinions have differed as to the effect of the statute in a court of civil jurisdiction." The correct view seems to be that the possession of a rightful owner gained by forcible entry is lawful as between the parties, but he shall be punished for the breach of the peace by losing it, besides making a fine to the king. If the latest decisions are correct, the dispossessed intruder might nevertheless have had a civil remedy in some form (by special action on the case, it would seem) for incidental injuries to person or goods.

A trespasser may in any case be turned off land before he has gained possession, and he does not gain possession until there has been something like acquiescence in the physical fact of his occupation on the part of the rightful owner. His condition is quite different from that of a rightful owner out of possession, who can recover legal possession by any kind of effective interruption of the intruder's actual and exclusive control. There must be not only occupation, but effective occupation, for the acquisition of possessory rights. And unless and until possession has been acquired, the very continuance of the state of things which constitutes the trespass is a new trespass at every moment.

Recaption of goods. As regards goods which have been wrongfully taken, the taker is a trespasser all the time that his wrongful possession continues, so much so that "the removal of goods, wrongfully taken at first, from one place to another, is held to be a several trespass at each place." Accordingly the true owner may retake the goods if he can, even from an innocent third person into whose hands they have come; and, as there is nothing in this case answering to the statutes of forcible entry, he may use whatever force is reasonably necessary for the recaption. He may also enter on the first taker's land for the purpose of recapture if the taker has put the goods there, for they came there by the occupier's own wrong; but he cannot enter on a third person's land unless, it is

said, the original taking was felonious, or perhaps, as it has been suggested, after the goods have been claimed and the occupier of the land has refused to deliver them.

One of the most important heads of justification under a paramount right is the execution of legal process. The mere taking and dealing with that which the law commands to be so taken and dealt with, be it the possession of land or goods, or both possession and property of goods, is of course no wrong; and in particular if possession of a house cannot be delivered in obedience to a writ without breaking the house open, broken it must be. It is equally settled on the other hand that "the sheriff must at his peril seize the goods of the party against whom the writ issues," and not any other goods which are wrongfully supposed to be his; even unavoidable mistake is no excuse.

Outer doors may not be broken in execution of process at the suit of a private person; but at the suit of the Crown, or in execution of process for contempt of a House of Parliament or of a Superior Court, they may, and must; and this, in the latter case, though the contempt consist in disobedience to an order made in a private suit.

The right of distress, where it exists, justifies the taking of goods from the true owner: it seems that the distrainor does not acquire possession, the goods being "in the custody of the law." Most of the practical importance of the subject is in connection with the law of landlord and tenant, and we shall not enter here on the learning of distress for rent and other charges on land.

Distress damage feasant is the taking by an occupier of land of chattels (commonly, but not necessarily, animals) found encumbering or doing damage on the land. The right given by the law is therefore a right of self-protection against the continuance of a trespass already commenced. It must be a manifest trespass; distress damage feasant is not allowed against a party having any color of right, e. g., one commoner cannot distrain upon another commoner for surcharging. "For damage feasant one may distreine in the night, otherwise it may be the beasts will be gone before he can take them." But in other respects "damage feasant is the strictest distress that is, for the thing distrained must be taken in

the very act," and held only as a pledge for its own individual trespass, and other requirements observed.

Entry to take a distress must be peaceable and without breaking in; it is not lawful to open a window, though not fastened, and enter thereby.

Finally there are cases in which entry on land without consent is excused by the necessity of self-preservation, or the defence of the realm, or an act of charity preserving the occupier from irremediable loss, or sometimes by the public safety or convenience, as in putting out fires, or as where a highway is impassable, and passing over the land on either side is justified; but in this last-mentioned case it is perhaps rather a matter of positive common right than of excuse.

Fox-hunting. At one time it was supposed that the law justified entering on land in fresh pursuit of a fox, because the destruction of noxious animals is to be encouraged; but this is not the law now.

Trespass ab initio. A possessor by consent, or a licensee. may commit a wrong by abusing his power, but he is not a trespasser. If I lend you a horse to ride to York, and you ride to Carlisle, I shall not have (under the old forms of pleading) a general action of trespass, but an action on the case. But "when entry, authority, or license is given to any one by the law, and he doth abuse it, he shall be a trespasser ab initio," that is, the authority or justification is not only determined, but treated as if it had never existed. gives authority to enter into a common inn or tavern: so to the lord to distrain: to the owner of the ground to distrain damage feasant; to him in reversion to see if waste be done; to the commoner to enter upon the land to see his cattle; and such like. . . . But if he who enters into the inn or tavern doth a trespass, as if he carries away anything; or if the lord who distrains for rent, or the owner for damage feasant, works or kills the distress : or if he who enters to see waste break the house or stave there all night: or if the commoner cuts down a tree; in these and the like cases the law adjudges that he entered for that purpose, and because the act which demonstrates it is a trespass, he shall be a trespasser ab initio."1

<sup>1</sup> The Six Carpenters' Case, 8 Co. Rep. 146 a. b.

This doctrine is applicable only when there has been some kind of active wrong-doing; not when there has been a mere refusal to do something one ought to do—as to pay for one's drink at an inn.

### 10. - Remedies.

The only peculiar remedy available for this class of wrongs is distress damage feasant, which, though an imperfect remedy, is so far a remedy that it suspends the right of action for the trespass. The distrainor "has an adequate satisfaction for his damage till he lose it without default in himself;" in which case he may still have his action. The retaking of goods taken by trespass does not, it seems, extinguish the true owner's right of action, though it of course affects the amount of damages.

An injunction can be granted to restrain a continuing trespass, such as the laying and keeping of waterpipes under a man's ground without either his consent or justification by authority of law; and the plaintiff need not prove substantial damage to entitle himself to this form of relief.

### CHAPTER X.

#### NUISANCE.

Nuisance is the wrong done to a man by unlawfully disturbing him in the enjoyment of his property or, in some cases, in the exercise of a common right. The wrong is in some respects analogous to trespass, and the two may coincide, some kinds of nuisance being also continuing trespasses. The scope of nuisance, however, is wider. A nuisance may be public or private.

Public or common nuisances affect the Queen's subjects at large, or some considerable portion of them, such as the inhabitants of a town; and the person therein offending is liable to criminal prosecution. A public nuisance does not necessarily create a civil cause of action for any person; but it may do so under certain conditions.

A private nuisance affects only one person or a determinate number of persons, and is the ground of civil proceedings only. Generally it affects the control, use, or enjoyment of immovable property; but this is not a necessary element.

In order to sustain an indictment for nuisance it is enough to show that the exercise of a common right of the Queen's subjects has been sensibly interfered with. It is no answer to say that the state of things causing the obstruction is in some other way a public convenience. It is also not material whether the obstruction interferes with the actual exercise of the right as it is for the time being exercised.

A private action can be maintained in respect of a public nuisance by a person who suffers thereby some particular loss or damage beyond what is suffered by him in common with all other persons affected by the nuisance. Interference with a common right is not of itself a cause of action for the individual citizen. Particular damage consequent on the interference is.

In the modern authorities the conception of private nuisance includes all injuries to an owner or occupier in the enjoyment of the property of which he is in possession, without regard to the quality of the tenure. Blackstone's phrase is "anything done to the hurt or annoyance of the land, tenements or hereditaments of another"—that is, so done without any lawful ground of justification or excuse.

Kinds of nuisance, affecting—1. Ownership. Some acts are nuisances, according to the old authorities and the course of procedure on which they were founded, which involve such direct interference with the rights of a possessor as to be also trespasses, or hardly distinguishable from trespasses. "A man shall have an assize of nuisance for building a house higher than his house, and so near his, that the rain which falleth upon that house falleth upon the plaintiff's house." And it is stated to be a nuisance if a tree growing on my land overhangs the public road, or my neighbor's land. In this class of cases nuisance means nothing more than

encroachment on the legal powers and control of the public or of one's neighbor. It is generally, though not necessarily, a continuing trespass.

- 2. Iura in re aliena. Another kind of nuisance consists in obstructions of rights of way and other rights over the property of others. "The parishioners may pull down a wall which is set up to their nuisance in their way to the church." In modern times the most frequent and important examples of this class are cases of interference with rights to light.
- 3. Convenience and enjoyment. A third kind, and that which is most commonly spoken of by the technical name, is the continuous doing of something which interferes with another's health or comfort in the occupation of his property, such as carrying on a noisy or offensive trade.

Measure of nuisance. What amount of annoyance or inconvenience will amount to a nuisance in point of law cannot, by the nature of the question, be defined in precise terms.

- (a) It is not necessary, to constitute a private nuisance, that the acts or state of things complained of should be noxious in the sense of being injurious to health. It is enough that there is a material interference with the ordinary comfort and convenience of life—"the physical comfort of human existence"—by an ordinary and reasonable standard; there must be something more than mere loss of amenity, but there need not be positive hurt or disease.
- (b) In ascertaining whether the property of the plaintiff is in fact injured, or his comfort or convenience in fact materially interfered with, by an alleged nuisance, regard is had to the character of the neighborhood and the pre-existing circumstances. But the fact that the plaintiff was already exposed to some inconvenience of the same kind will not of itself deprive him of his remedy. Even if there was already a nuisance, that is not a reason why the defendant should set up an additional nuisance.

Neither does it make any difference that the very nuisance complained of existed before the plaintiff became owner or occupier. It was at one time held that if a man came to the nuisance, as was said, he had no remedy; but this has long ceased to be law as re-

gards both the remedy by damages, and the remedy by injunction. The defendant may in some cases justify by prescription, or the plaintiff be barred of the most effectual remedies by acquiescence. But these are distinct and special grounds of defence, and if relied on must be fully made out by appropriate proof.

Further, the wrong and the right of action begin only when the nuisance begins. Therefore, if Peter has for many years carried on a noisy business on his own land, and his neighbor John makes a new building on his own adjoining land, in the occupation whereof he finds the noise, vibration, or the like, caused by Peter's business, to be a nuisance, Peter cannot justify continuing his operations as against John by showing that before John's building was occupied, John or his predecessors in title made no complaint.

- (c) Again a nuisance is not justified by showing that the trade or occupation causing the annoyance is, apart from that annoyance, an innocent or laudable one. "The building of a lime-kiln is good and profitable; but if it be built so near a house that when it burns the smoke thereof enters into the house, so that none can dwell there, an action lies for it."
- (d) Where the nuisance complained of consists wholly or chiefly in damage to property, such damage must be proved as is of appreciable magnitude and apparent to persons of common intelligence; not merely something discoverable only by scientific tests. But where material damage in this sense is proved, or material discomfort according to a sober and reasonable standard of comfort, it is no answer to say that the offending work or manufacture is carried on at a place in itself proper and convenient for the purpose.
- (e) No particular combination of sources of annoyance is necessary to constitute a nuisance, nor are the possible sources of annoyance exhaustively defined by any rule of law. "Smoke, unaccompanied with noise or noxious vapor, noise alone, offensive vapors alone, although not injurious to health, may severally constitute a nuisance to the owner of adjoining or neighboring property." The persistent ringing and tolling of large bells, the loud music, shouting, and other noises attending the performances of a circus, the collection of a crowd of

disorderly people by a noisy entertainment of music and fireworks, to the grave annoyance of dwellers in the neighborhood, have all been held to be nuisances and restrained by the authority of the court.

(f) Where a distinct private right is infringed, though it be only a right enjoyed in common with other persons, it is immaterial that the plaintiff suffered no specific injury beyond those other persons, or no specific injury at all. Thus any one commoner can sue a stranger who lets his cattle depasture the common; and any one of a number of inhabitants entitled by local custom to a particular water supply can sue a neighbor who obstructs that supply.

A species of nuisance which has become prominent in modern law, by reason of the increased closeness and height of buildings in towns, is the obstruction of light: often the phrase "light and air" is used, but the addition is useless if not misleading, inasmuch as a specific right to the access of air over a neighbor's land is not known to the law.

The right to light is not a natural right incident to the ownership of windows, but an easement to which title must be shown by grant, express or implied, or by prescription at common law, or under the Prescription Act.

Assuming the right to be established, there is a wrongful disturbance if the building in respect of which it exists is so far deprived of access of light as to render it materially less fit for comfortable or beneficial use or enjoyment in its existing condition; if a dwelling-house, for ordinary habitation; if a warehouse or shop, for the conduct of business.

Disturbing the private franchise of a market or a ferry is commonly reckoned a species of nuisance in our books.

The remedies for nuisance are threefold: abatement, damages, and injunction: of which the first is by the act of the party aggrieved, the others by process of law. Damages are recoverable in all cases where nuisance is proved, but in many cases are not an adequate remedy. The more stringent remedy by injunction is available in such cases, and often takes the place of abatement where that would be too hazardous a proceeding.

The abatement of obstructions to highways, and the like, is still of importance as a means of asserting public rights. Private rights which tend to the benefit of the public, or a considerable class of persons, such as rights of common, have within recent times been successfully maintained in the same manner, though not without the addition of judicial proceedings.

If another man's tree overhangs my land, I may lawfully cut the overhanging branches; and in these cases where the nuisance is in the nature of a trespass, and can be abated without entering on another's land, it does not appear that the wrong-doer is entitled to notice. But if the nuisance is on the wrong-doer's own tenement, he ought first to be warned and required to abate it himself. After notice and refusal, entry on the land to abate the nuisance may be justified.

In the case of abating nuisances to a right of common, notice is not strictly necessary unless the encroachment is a dwelling-house in actual occupation; but if there is a question of right to be tried, the more reasonable course is to give notice. The same rule seems on principle to be applicable to the obstruction of a right of way.

It is doubtful whether there is any private right to abate a nuisance consisting only in omission except where the person aggrieved can do it without leaving his own tenement in respect of which he suffers, and perhaps except in cases of urgency such as to make the act necessary for the immediate safety of life or property.

In every case the party taking on himself to abate a nuisance must avoid doing any unnecessary damage as is shown by the old form of pleading in justification. Thus it is lawful to remove a gate or barrier which obstructs a right of way, but not to break or deface it beyond what is necessary for the purpose of removing it.

Formerly there were processes of judicial abatement available for freeholders under the writ *Quod permittat* and the assize of nuisance. But these remedies have been superseded by action on the case at law and by injunction in the Court of Chancery.

Damages. Persistence in a proved nuisance is stated to be a just cause for giving exemplary damages. There is a place for nominal damages in cases where the nuisance consists merely in

the obstruction of a right of legal enjoyment, such as a right of common, which does not cause any specific harm or loss to the plaintiff. At common law damages could not be awarded for any injury received from the continuance of a nuisance since the commencement of the action.

The most efficient and flexible remedy is that of injunction. Under this form the court can prevent that from being done which, if done, would cause a nuisance.

In order to obtain an injunction it must be shown that the injury complained of as present or impending is such as by reason of its gravity, or its permanent character, or both, cannot be adequately compensated in damages. The injury must be either irreparable or continuous. It is not, however, a necessary condition of obtaining an injunction to show material specific damage. Continuous interference with a legal right in a manner capable of producing material damage is enough.

As to the person entitled to sue for a nuisance: as regards interference with the actual enjoyment of property, only the tenant in possession can sue; but the landlord or reversioner can sue if the injury is of such a nature as to affect his estate, say by permanent depreciation of the property, or by setting up an adverse claim of right.

As to liability: The person primarily liable for a nuisance is he who actually creates it, whether on his own land or not. The owner or occupier of land on which a nuisance is created, though not by himself or by his servants, may also be liable in certain conditions. If a man lets a house or land with a nuisance on it, he as well as the lessee is answerable for the continuance thereof, if it is caused by the omission of repairs which as between himself and the tenant he is bound to do, but not otherwise. It seems the better opinion that where the tenant is bound to repair, the lessor's knowledge, at the time of letting, of the state of the property demised makes no difference, and that only something amounting to an authority to continue the nuisance will make him liable.

Again, an occupier who by license (not parting with the possession) authorizes the doing on his land of something whereby a nuisance is created is liable. But a lessor is not liable merely because he has demised to a tenant something capable of being so used as to create a nuisance, and the tenant has so used it. Nor is an owner not in possession bound to take any active steps to remove a nuisance which has been created on his land without his authority and against his will.

If one who has erected a nuisance on his land conveys the land to a purchaser who continues the nuisance, the vendor remains liable, and the purchaser is also liable if on request he does not remove it.

#### CHAPTER XI.

#### NEGLIGENCE.

#### 1. — The General Conception.

For acts and their results (within the limits expressed by the term "natural and probable consequences." and subject to the grounds of justification and excuse), the actor is, generally speaking, held answerable by law. For mere omission a man is not, generally speaking. held answerable. Unless he is under some specific duty of action, his omission will not in any case be either an offence or a civil wrong. Some already existing relation of duty must be established, which relation will be found in most cases, though not in all, to depend on a foregoing voluntary act of the party held liable. He was not in the first instance bound to do anything at all; but by some independent motion of his own he has given hostages, so to speak, to the law. Thus I am not compelled to employ servants, but if I do. I must answer for their conduct in the course of their employment. The widest rule of this kind is that which is developed in the law of Negligence. One who enters on the doing of anything attended with risk to the persons or property of others is held answerable for the use of a certain measure of caution to guard against that risk.

The caution that is required is in proportion to the magnitude and the apparent imminence of the risk. The general rule is that every one is bound to exercise due care towards his neighbors in his acts and conduct, or rather omits or falls short of it at his peril; the peril, namely, of being liable to make good whatever harm may be a proved consequence of the default.

In some cases this ground of liability may co-exist with a liability on contract towards the same person, and arising (as regards the breach) out of the same facts. Where a man interferes gratuitously, he is bound to act in a reasonable and prudent manner according to the circumstances and opportunities of the case. And this duty is not affected by the fact, if so it be, that he is acting for reward, in other words, under a contract, and may be liable on the contract. The two duties are distinct, except so far as the same party cannot be compensated twice over for the same facts, once for the breach of contract and again for the wrong. Negligence in performing a contract and negligence independent of contract create liability in different ways; but the authorities that determine for us what is meant by negligence are in the main applicable to both.

The general rule was thus stated by Baron Alderson: "Negligence is the omission to do something which a reasonable man guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do:" provided, of course, that the party whose conduct is in question is already in a situation that brings him under the duty of taking care. The standard of duty is not the foresight and caution which this or that particular man is capable of, but the foresight and caution of a prudent man, the average prudent man, or, as our books rather affect to say, a reasonable man—standing in this or that man's shoes.

The general duty of diligence includes the particular duty of competence in cases where the matter taken in hand is of a sort requiring more than the knowledge or ability which any prudent man may be expected to have. The test is whether the defendant has done "all that any skilful person could reasonably be required to do in such a case."

#### 2. - Evidence of Negligence.

Whether due care and caution have been used in a given case is, by the nature of things, a question of fact. But it is not a pure question of fact in the sense of being open as a matter of course and without limit. Before the court or the jury can proceed to pass upon the facts alleged by the plaintiff, the court must be satisfied that those facts, if proved, are in law capable of supporting the inference that the defendant has failed in what the law requires at his hands. In the current forensic phrase, there must be evidence of negligence.

Where there is no contract between the parties the burden of proof is on him who complains of negligence. "Where the evidence given is equally consistent with the existence or non-existence of negligence, it is not competent to the judge to leave the matter to the jury."

Sometimes it is said that the burden of proof is on the plaintiff to show that he was himself using due care, and it has been attempted to make this supposed principle a guide to the result to be arrived at in cases where the defence of contributory negligence is set up. We do not think this view tenable on the recent English authorities.

The general principle has to be modified where there is a relation of contract between the parties, and (it should seem) when there is a personal undertaking without a contract.

Thus, when a railway train runs off the line, or runs into another train, both permanent way and carriages, or both trains (as the case may be) being under the same company's control, these facts, if unexplained, are as between the company and a passenger evidence of negligence.

In like manner if a man has undertaken, whether for reward or not, to do something requiring special skill, he may fairly be called on, if things go wrong, to prove his competence; though if he is a competent man, the mere fact of a mishap (being of a kind that even a competent person is exposed to) would of itself be no evidence of negligence.

Again there is a presumption of negligence when the cause of the mischief was apparently under the control of the defendant or his servants.

Therefore, if I am lawfully and as of right passing in a place where people are handling heavy goods, and goods being lowered by a crane fall upon me and knock me down, this is evidence of negligence against the employer of the men who were working the crane.

The court will take judicial notice of what happens in the ordinary course of things, at all events to the extent of using their knowledge of the common affairs of life to complete or correct what is stated by witnesses.

When the evidence, if believed, is less consistent with diligence than with negligence on the defendant's part, or shows the non-performance of a specific positive duty laid on him by statute, contract, or otherwise; then the judgment whether the plaintiff has suffered by the defendant's negligence is a judgment of fact, and on a trial by jury must be left as such in the hands of the jury.

"The judge has a certain duty to discharge, and the jurors have another and a different duty. The judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether, from those facts, when submitted to them, negligence ought to be inferred."

The amount of caution required of a citizen in his conduct is proportioned to the amount of apparent danger. In estimating the probability of danger to others, we are entitled to assume, in the absence of anything to show the contrary, that they have the full use of common faculties, and are capable of exercising ordinary caution.

On the other hand it seems clear that greater care is required of us when it does appear that we are dealing with persons of less than ordinary faculty. Thus, if a man driving sees that a blind man, an aged man, or a cripple, is crossing the road ahead, he must govern his course and speed accordingly. He will not discharge himself, in the event of a mishap, merely by showing that a young and active man with good sight would have come to no harm.

#### 3. — Contributory Negligence.

In order that a man's negligence may entitle another to a remedy against him, that other must have suffered harm whereof this negligence is the proximate cause. "The received and usual way of directing a jury [in cases of socalled contributory negligence] is to say that if the plaintiff could. by the exercise of such care and skill as he was bound to exercise. have avoided the consequence of the defendant's negligence, he cannot recover." That is to say, he is not to lose his remedy merely because he has been negligent at some stage of the business. though without that negligence the subsequent events might not or could not have happened; but only if he has been negligent in the final stage and at the decisive point of the event, so that the mischief, as and when it happens, is proximately due to his own want of care and not to the defendant's. The rule is subject to this qualification, "namely, that though the plaintiff may have been guilty of negligence, and although that negligence may in fact have contributed to the accident, yet if the defendant could in the result, by the exercise of ordinary care and diligence, have avoided the mischief which happened, the plaintiff's negligence will not excuse him." Negligence will not disentitle the plaintiff to recover. unless it be such that without it the harm complained of could not have happened; "nor if the defendant might by the exercise of care on his part have avoided the consequences of the neelect or carelessness of the plaintiff."

The plaintiff may fail because it appears that the decisive cause of his damage was his own want of due care. On the same principle he may fail if the decisive cause was want of due care on the part of some other person indifferent to the defendant. As regards the defendant, the case is the same as if the accident had been altogether inevitable. Hence if A. is riding in B.'s carriage, driven by B.'s servant, and through a collision with C.'s carriage A. takes hurt, the decision must in every case depend on the question of fact to whose fault the harm was proximately due. If the negligence or wilful wrong of C.'s driver was the sole proximate cause, A.'s remedy will be against C. If B.'s driver was in fault so that his wrong and not that of C.'s driver was the

proximate cause, A. may have a remedy against B., but has none against C.

There may be more than one proximate cause; there are cases in which two or more persons have so acted, though not in concert or simultaneously, as to be liable as joint wrong-doers. A. leaves a loaded gun in a place accessible to young persons; B. and C., two schoolboys, come there; B. takes up the gun, points it at C., and draws the trigger; the gun goes off and bursts, wounding both B. and C. Here B. cannot sue A., but as regards C., A. and B. are joint wrong-doers.

Accidents to children in custody of adult. Again if A. is a child of tender years (or other person incapable of taking ordinary care of himself), but in the custody of M., an adult, and one or both of them suffer harm under circumstances tending to prove negligence on the part of Z., and also contributory negligence on the part of M., Z. will not be liable to A. unless Z.'s negligence was the proximate cause of the mischief. Therefore if M. could. by such reasonable diligence as is commonly expected of persons having the care of young children, have avoided the consequences of Z.'s negligence. A. is not entitled to sue Z.: and this not because M.'s negligence is imputed by a fiction of law to A., who by the hypothesis is incapable of either diligence or negligence, but because the needful foundation of liability is wanting, namely, that Z.'s negligence, and not something else for which Z. is not answerable and which Z. had no reason to anticipate, should be the proximate cause.

Children, &c., unattended. Now take the case of a child not old enough to use ordinary care for its own safety, which by the carelessness of the person in charge of it is allowed to go alone in a place where it is exposed to danger. If the child comes to harm, does the antecedent negligence of the custodian make any difference to the legal result? On principle, surely not, unless a case can be conceived in which that negligence is the proximate cause. No English decision has been met with that goes the length of depriving a child of redress on the ground that a third person negligently allowed it to go alone. In America there have been such decisions in Massachusetts, New York, and elsewhere; "but there are as many decisions to the contrary": and the supposed rule in

Thorogood v. Bryan, has been explicitly rejected by the Supreme Court of the United States.

The common-law rule of contributory negligence is unknown to the maritime law administered in courts of Admiralty jurisdiction. Under a rule commonly called *judicium rusticum*, the loss is equally divided in cases of collision, where both ships are found to have been in fault.

## 4. - Auxiliary Rules and Presumptions.

A man, who by another's want of care finds himself in a position of imminent danger, cannot be held guilty of negligence merely because in that emergency he does not act in the best way to avoid the danger. That which appears the best way to a court examining the matter afterwards at leisure and with full knowledge is not necessarily obvious even to a prudent and skilful man on a sudden alarm. Still less can the party whose fault brought on the risk be heard to complain of the other's error of judgment. This rule has been chiefly applied in maritime cases, where a ship placed in peril by another's improper navigation has at the last moment taken a wrong course; but there is authority for it elsewhere.

No man is bound (either for the establishment of his own claims, or to avoid claims of third persons against him) to use special precaution against merely possible want of care or skill on the part of others.

When a person, having an apparent dilemma of evils or risks put before him by another's default, makes an active choice between them, the principle applied is not dissimilar; it is not necessarily and of itself contributory negligence to do something which, apart from the state of things due to the defendant's negligence, would be imprudent.

Where the defendant's negligence has put the plaintiff in a situation of imminent peril, the plaintiff may hold the defendant liable for the natural consequences of action taken on the first alarm, though such action may turn out to have been unnecessary. It is also held

1 8 C. B. 115: 18 L. J. C. P. 886 (1849).

that the running of even an obvious and great risk in order to save human life may be justified, as against those by whose default that life is put in peril.

A peculiar difficulty may arise in cases where the acts or omissions of two persons concur to produce damage to a third. A. leaves the flap of a cellar in an insecure position on a highway where all manner of persons, adult and infant, wise and foolish, are accustomed to pass. B., carelessly passing, or playing with the flap, brings it down on C. It may well be that A. should have anticipated and guarded against the risk of a thing so left being meddled with, and therefore is liable to C., though B. also would be liable to C., and of course could not sue A. if he was hurt himself.

#### CHAPTER XII.

#### DUTIES OF INSURING SAFETY.

The law takes notice that certain things are a source of extraordinary risk, and a man who exposes his neighbor to such risk is held, although his act is not of itself wrongful, to insure his neighbor against any consequent harm not due to some cause beyond human foresight and control. The leading case upon this subject is Rylands v. Fletcher, where the judgment of the Exchequer Chamber delivered by Blackburn, J., was adopted in terms by the House of Lords.

"It appears from the statement in the case, that the plaintiff was damaged by his property being flooded by water, which, without any fault on his part, broke out of a reservoir constructed on the defendants' land by the defendants orders, and maintained by the defendants.

"It appears from the statement in the case, that the coal under the defendants' land had at some remote period been worked out; but this was unknown at the time when the defendants gave directions to erect the reservoir, and the water in the reservoir would not

<sup>1</sup> L R 1 Ex. 278: s. c. L R. 3 H. L 380.

have escaped from the defendants' land, and no mischief would have been done to the plaintiff, but for this latent defect in the defendants' subsoil. And it further appears that the defendants selected competent engineers and contractors to make their reservoir, and themselves personally continued in total ignorance of what we have called the latent defect in the subsoil; but that these persons employed by them in the course of the work became aware of the existence of the ancient shafts filled up with soil, though they did not know or suspect that they were shafts communicating with old workings.

"It is found that the defendants personally were free from all blame, but that in fact proper care and skill was not used by the persons employed by them, to provide for the sufficiency of the reservoir with reference to these shafts. The consequence was that the reservoir when filled with water burst into the shafts, the water flowed down through them into the old workings, and thence into the plaintiff's mine, and there did the mischief.

"The plaintiff, though free from all blame on his part, must bear the loss unless he can establish that it was the consequence of some default for which the defendants are responsible. The question of law therefore arises, what is the obligation which the law casts on a person who, like the defendants, lawfully brings on his land something which, though harmless whilst it remains there, will naturally do mischief if it escape out of his land. It is agreed on all hands that he must take care to keep in that which he has brought on the land and keeps there, in order that it may not escape and damage his neighbors; but the question arises whether the duty which the law casts upon him, under such circumstances, is an absolute duty to keep it in at his peril, or is, as the majority of the Court of Exchequer have thought, merely a duty to take all reasonable and prudent precautions in order to keep it in, but no more.

"We think that the true rule of law is, that the person who for his own purposes brings on his lands and collects and keeps there, anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape. He can excuse himself by

showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major, or the act of God; but as nothing of this sort exists here, it is unnecessary to inquire what excuse would be sufficient.

"Upon authority, this, we think, is established to be the law, whether the things so brought be beasts, or water, or filth, or stenches."

This decision was affirmed in the House of Lords, and the reasons given for it fully confirmed.

No subsequent case has been found, not being closely similar in its facts to Rylands v. Fletcher, or within some previously recognized category, in which the unqualified rule of liability without proof of negligence has been enforced.

Exceptions: On the other hand, the rule in Rylands v. Fletcher has been decided by the Court of Appeal not to apply to damage of which the immediate cause is the act of God. And the act of God does not necessarily mean an operation of natural forces so violent and unexpected that no human foresight or skill could possibly have prevented its effects. It is enough that the accident should be such as human foresight could not be reasonably expected to anticipate; and whether it comes within this description is a question of fact. The authority of Rylands v. Fletcher is unquestioned, but Nichols v. Marsland has practically empowered juries to mitigate the rule whenever its operation seems too harsh.

Again the principal rule does not apply where the immediate cause of damage is the act of a stranger, nor where the artificial work which is the source of danger is maintained for the common benefit of the plaintiff and the defendant; and there is some ground for also making an exception where the immediate cause of the harm, though in itself trivial, is of a kind outside reasonable expectation.

There is yet another exception in favor of persons acting in the performance of a legal duty, or in the exercise of powers specially conferred by law. Where a zamindár maintained, and was by custom bound to maintain, an ancient tank for the general benefit of agriculture in the district, the Judicial

<sup>&</sup>lt;sup>1</sup> Nichols v. Marsland (1875-6) L. R. 10 Ex. 255; 2 Ex. D. 1.

Committee agreed with the High Court of Madras in holding that he was not liable for the consequences of an overflow caused by extraordinary rainfall, no negligence being shown.

Other cases of insurance liability; Cattle Trespass.—
It is the nature of cattle and other live stock to stray if not kept in, and to do damage if they stray; and the owner is bound to keep them from straying on the land of others at his peril, though liable only for natural and probable consequences, not for an unexpected event, such as a horse not previously known to be vicious kicking a human being. So strict is the rule, that if any part of an animal which the owner is bound to keep in is over the boundary, this constitutes a trespass. The owner of a stallion has been held liable on this ground for damage done by the horse kicking and biting the plaintiff's mare through a wire fence which separated their closes.

The rule does not apply to damage done by cattle straying off a highway on which they are being lawfully driven: in such case the owner is liable only on proof of negligence; and the law is the same for a town street as for a country road.

"Whether the owner of a dog is answerable in trespass for every unauthorized entry of the animal into the land of another, as is the case with an ox," is an undecided point. The better opinion seems to favor a negative answer.

Closely connected with this doctrine is the responsibility of owners of dangerous animals. "A person keeping a mischievous animal with knowledge of its propensities is bound to keep it secure at his peril." If it escapes and does mischief, he is liable without proof of negligence, neither is proof required that he knew the animal to be mischievous, if it is of a notoriously fierce or mischievous species. If the animal is of a tame and domestic kind, the owner is liable only on proof that he knew the particular animal to be "accustomed to bite mankind," as the common form of pleading ran in the case of dogs, or otherwise vicious; but when such proof is supplied, the duty is absolute as in the former case. It is enough to show that the animal has on foregoing occasions manifested a savage disposition, whether with the actual result of doing mischief on any of those occasions or not.

The risk incident to dealing with fire, fire-arms, explosive or highly inflammable matters, corrosive or otherwise dangerous or noxious fluids, and (it is apprehended) poisons, is accounted by the common law among those which subject the actor to strict responsibility. Sometimes the term "consummate care" is used to describe the amount of caution required: but it is doubtful whether even this be strong enough. At least, we do not know of any English case of this kind (not falling under some recognized head of exception) where unsuccessful diligence on the defendant's part was held to exonerate him.

As to fire, we find it in the fifteenth century stated to be the custom of the realm (which is the same thing as the common law) that every man must safely keep his own fire so that no damage in any wise happen to his neighbor. Liability for domestic fires has been dealt with by statute, and a man is not now answerable for damage done by a fire which began in his house or on his land by accident and without negligence.

The use of fire for non-domestic purposes, if we may coin the phrase, remains a ground of the strictest responsibility.

Decisions of our own time have settled that one who brings fire into dangerous proximity to his neighbor's property, in such ways as by running locomotive engines on a railway without express statutory authority for their use, or bringing a traction engine on a highway, does so at his peril. In the modern practice of the United States this doctrine has not found acceptance. In New York it has, after careful discussion, been expressly disallowed.

Loaded fire-arms are regarded as highly dangerous things, and persons dealing with them are answerable for damage done by their explosion, even if they have used apparently sufficient precaution.

On a like principle it is held that people sending goods of an explosive or dangerous nature to be carried are bound to give reasonable notice of their nature, and, if they do not, are liable for resulting damage. So it was held where nitric acid was sent to a carrier without warning, and the carrier's servant, handling it as he would handle a vessel of any harmless fluid, was injured by its escape.

Gas (the ordinary illuminating coal-gas) is not of itself, perhaps,

a dangerous thing, but with atmospheric air forms a highly dangerous explosive mixture, and also makes the mixed atmosphere incapable of supporting life. Persons undertaking to deal with it are therefore bound, at all events, to use all reasonable diligence to prevent an escape which may have such results.

Poisons can do as much mischief as loaded fire-arms or explosives, though the danger and the appropriate precautions are different.

A wholesale druggist in New York purported to sell extract of dandelion to a retail druggist. The thing delivered was in truth extract of belladonna, which by the negligence of the wholesale dealer's assistant had been wrongly labelled. By the retail druggist this extract was sold to a country practitioner, and by him to a customer, who took it as and for extract of dandelion, and thereby was made seriously ill. The Court of Appeals held the wholesale dealer liable to the consumer.

Duties imposed by law on the occupiers of buildings, or persons having the control of other structures intended for human use and occupation, in respect of the safe condition of the building or structure.

The duty is founded not on ownership, but on possession, in other words, on the structure being maintained under the control and for the purposes of the person held answerable. It goes beyond the common doctrine of responsibility for servants, for the occupier cannot discharge himself by employing an independent contractor for the maintenance and repair of the structure, however careful he may be in the choice of that contractor. Personal diligence on the part of the occupier and his servants is immaterial. The structure has to be in a reasonably safe condition, so far as the exercise of reasonable care and skill can make it so.

In the leading case of Indermaur v. Dames 2 the plaintiff was a journeyman gas-fitter, employed to examine and test some new burners which had been supplied by his employer for use in the defendant's sugar-refinery. While on an upper floor of the building, he fell through an unfenced shaft which was used in working hours

<sup>&</sup>lt;sup>2</sup> Thomas v. Winchester (1852), 6 N. Y. 897; Bigelow L. C. 602.

<sup>&</sup>lt;sup>2</sup> L. R. 1 C. P. 274; 2 C. P. 811.

for raising and lowering sugar. It was found as a fact that there was no want of reasonable care on the plaintiff's part, which amounts to saying that even to a careful person not already acquainted with the building the danger was an unexpected and concealed one. The court held that on the admitted facts the plaintiff was in the building as "a person on lawful business, in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest, and not upon bare permission." They therefore had to deal with the general question of law "as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business, upon his invitation, express or implied. The common case is that of a customer in a shop: but it is obvious that this is only one of a class. . . .

"The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied.

"And, with respect to such a visitor at least, we consider it settled law, that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact."

The court goes on to admit that "there was no absolute duty to prevent danger, but only a duty to make the place as little dangerous as such a place would reasonably be, having regard to the contrivances necessarily used in carrying on the business."

It is hardly needful to add that a customer, or other person entitled to the like measure of care, is protected not only while he is actually doing his business, but while he is entering and leaving.

With regard to the person, one acquires this right to safety by being upon the spot, or engaged in work on or about the property whose condition is in question, in the course of any business in which the occupier has an interest. It is not necessary that there should be any direct or apparent benefit to the occupier from the particular transaction.

The possession of any structure to which human beings are intended to commit themselves or their property, animate or inanimate, entails this duty on the occupier, or rather controller. It extends to gangways or staging in a dock; to a temporary stand put up for seeing a race or the like; to carriages travelling on a railway or road, or in which goods are despatched; to ships; and to market-places.

In the various applications we have mentioned, the duty does not extend to defects incapable of being discovered by the exercise of reasonable care, such as latent flaws in metal; though it does extend to all such as care and skill (not merely care and skill on the part of the defendant) can guard against.

Again, when the builder of a ship or carriage, or the maker of a machine, has delivered it out of his own possession and control to a purchaser, he is under no duty to persons using it as to its safe condition, unless the thing was in itself of a noxious or dangerous kind, or (it seems), unless he had actual knowledge of its being in such a state as would amount to a concealed danger to persons using it in an ordinary manner and with ordinary care.

Occupiers of fixed property are under a like duty towards persons passing or being on adjacent land by their invitation in the sense above mentioned, or in the exercise of an independent right.

Where damage is done by the falling of objects into a highway from a building, the modern rule is that the accident, in the absence of explanation, is of itself evidence of negligence.

The owner of property abutting on a highway is under a positive duty to keep his property from being a cause of danger to the public by reason of any defect either in structure, repair, or use and management, which reasonable care and skill can guard against.

But where an accident happens in the course of doing on fixed property work which is proper of itself, and not usually done by servants, and there is no proof either that the work was under the occupier's control, or that the accident was due to any defective condition of the structure itself with reference to its ordinary purposes, the occupier is not liable. In other words, he does not answer for the care or skill of an independent and apparently competent contractor in the doing of that which, though connected with the repair of a structure for whose condition the occupier does answer, is in itself merely incident to the contractor's business and under his order and control.

One who comes on or near another's property as a "bare licensee" must take the property as he finds it, and is entitled only not to be led into danger by "something like fraud." If the occupier, while the permission continues, does something that creates a concealed danger to people availing themselves of it, he may well be liable. And he would of course be liable, not for failure in a special duty, but for wilful wrong, if he purposely made his property dangerous to persons using ordinary care, and then held out his permission as an inducement to come on it.

Invitation is a word applied in common speech to the relation of host and guest. But a guest (that is, a visitor who does not pay for his entertainment) has not the benefit of the legal doctrine of invitation in the sense now before us. He is in point of law nothing but a licensee.

On the same principle, a man who offers another a seat in his carriage is not answerable for an accident due to any defect in the carriage of which he was not aware.

It may probably be assumed that a licensor is answerable to the licensee for ordinary negligence in the sense that his own act or omission will make him liable if it is such that it would create liability as between two persons having an equal right to be there.

### CHAPTER XIII.

#### SPECIAL RELATIONS OF CONTRACT AND TORT.

In modern English practice, personal causes of action cognizable by the superior courts of common law (and now by the High Court in the jurisdiction derived from them) have been regarded as arising either out of contract or out of wrongs independent of contract.

We have, however, causes of action nominally in contract which are not founded on the breach of any agreement, and we have torts which are not in any natural sense independent of contract.

This border-land between the law of tort and the law of contract will be the subject of examination in this chapter.

## 1. — Alternative Forms of Remedy on the same Cause of Action.

It may be hard to decide whether particular cases fall under this head or under the second, that is, whether there is one cause of action which the pleader has or had the choice of describing in two ways, or two distinct causes of action which may possibly confer rights on and against different parties. The most difficult questions we shall meet with are of this kind.

Misfeasance in doing an act in itself not unlawful is ground for an action on the case. It is immaterial that the act was not one which the defendant was bound to do at all. It is equally immaterial that the defendant may have bound himself to do the act, or to do it competently. The undertaking, if undertaking there was in that sense, is but the occasion and inducement of the wrong. The mere non-performance of a promise cannot, however, be treated as a substantive tort. There must be an active misdoing.

Certain kinds of employment, namely, those of a carrier and an innkeeper, are deemed public in a special sense. If a man holds himself out as exercising one of these, the law casts on him the duty of not refusing the benefit thereof, so far forth as his means extend, to any person who properly applies for

it. The innkeeper must not without a reasonable cause refuse to entertain a traveller, or the carrier to convey goods. Thus we have a duty attached to the mere profession of the employment, and antecedent to the formation of any contract; and if the duty is broken, there is not a breach of contract but a tort, for which the remedy under the common-law forms of pleading is an action on the case. In effect refusing to enter into the appropriate contract is of itself a tort.

In all other cases under this head there are not two distinct causes of action even in the alternative, nor distinct remedies, but one cause of action with, at most, one remedy in alternative forms. And it was an established rule, as long as the forms of action were in use, that the rights and liabilities of the parties were not to be altered by varying the form. Where there is an undertaking without a contract, there is a duty incident to the undertaking, and if it is broken there is a tort, and nothing else. The rule that if there is a specific contract the more general duty is superseded by it. does not prevent the general duty from being relied on where there is no contract at all. Even where there is a contract, our authorities do not say that the more general duty ceases to exist, or that a tort cannot be committed; but they say that the duty is "founded on contract." The contract, with its incidents either express or attached by law, becomes the only measure of the duties between the parties. There might be a choice, therefore, between forms of pleading, but the plaintiff could not by any device of form get more than was contained in the defendant's obligation under the contract.

Thus an infant could not be made chargeable for what was in substance a breach of contract by suing him in an action on the case; and the rule appears to have been first laid down for this special purpose.

# 2. - Concurrent Causes of Action.

Herein we have to consider -

(a) Cases where it is doubtful whether a contract has been formed or there is a contract "implied in law" without any real agreement in fact, and the same act which is a breach of the contract, if any, is at all events a tort;

- (b) Cases where A. can sue B. for a tort, though the same facts may give him a cause of action against M. for breach of contract;
- (c) Cases where A. can sue B. for a tort, though B.'s misfeasance may be a breach of a contract made not with A. but with M.
- (a) There are two modern railway cases in which the majority of the court held the defendants liable on a contract, but it was also said that even if there was no contract there was an independent cause of action. In Denton v. Great Northern Railway Company. 1 an intending passenger was held to have a remedy for damage sustained by acting on an erroneous announcement in the company's current time-table, probably on the footing of the time-table being the proposal of a contract, but certainly on the ground of its being a false representation. In Austin v. Great Western Railway Company,2 an action for harm suffered in some accident of which the nature and particulars are not reported, the plaintiff was a young child just above the age up to which children were entitled to pass free. The plaintiff's mother, who had charge of him, took a ticket for herself only. It was held that the company was liable either on an entire contract to carry the mother and the child (enuring. it seems, for the benefit of both, so that the action was properly brought by the child), or independently of contract, because the child was accepted as a passenger, and this cast a duty on the company to carry him safely. Such a passenger is, in the absence of fraud, in the position of using the railway company's property by invitation, and is entitled to the protection given to persons in that position by a class of authorities now well established.

Again if a servant travelling with his master on a railway loses his luggage by the negligence of the company's servants, it is immaterial that his ticket was paid for by his master, and he can sue in his own name for the loss. Evidently the plaintiff in a case of this kind must make his choice of remedies, and cannot have a double compensation for the same matter, first as a breach of contract and then as a tort; at the same time the rule that the defend-

<sup>&</sup>lt;sup>1</sup> 5 E. & B. 860; 25 L. J. Q. B. 129.

<sup>&</sup>lt;sup>2</sup> L. R. 2 Q. B. 442 (1867).

ant's liability must not be increased by varying the form of the claim is not here applicable, since the plaintiff may rely on the tort notwithstanding the existence of doubt whether there be any contract, or, if there be, whether the plaintiff can sue on it.

On the other hand we have cases in which an obvious tort is turned into a much less obvious breach of contract with the undisguised purpose of giving a better and more convenient remedy. Thus it is an actionable wrong to retain money paid by mistake, or on a consideration which has failed, and the like; but in the eighteenth century the fiction of a promise "implied in law" to repay the money so held was introduced, and afforded "a very extensive and beneficial remedy, applicable to almost every case where the defendant has received money which ex aequo et bono he ought to refund "and even to cases where goods taken or retained by wrong had been converted into money. The plaintiff was said to "waive the tort" for the purpose of suing in assumpsit on the fictitious contract.

Within still recent memory an essentially similar fiction of law has been introduced in the case of an ostensible agent obtaining a contract in the name of a principal whose authority he misrepresents. A person so acting is liable for deceit; but that liability, being purely in tort, does not extend to his executors, neither can he be held personally liable on a contract which he purported to make in the name of an existing principal. To meet this difficulty it was held in Collen v. Wright that when a man offers to contract as agent there is an implied warranty that he is really authorized by the person named as principal, on which warranty he or his estate will be answerable ex contractu.

(b) There may be two causes of action with a common plaintiff, or the same facts may give Z. a remedy in contract against A., and also a remedy in tort against B.

The latest and most authoritative decision on facts of this kind was given by the Court of Appeal in 1880.<sup>2</sup>

<sup>&</sup>lt;sup>1</sup> Ex. Ch. (1857) 8 E. & B. 647; 27 L. J. Q. B. 215.

Foulkes v. Metrop. Dist. R. Co., 5 C. P. Div. 157. Cp. Berringer v. G. E. R. Co. (1879) 4 C. P. D. 163.

The plaintiff, a railway passenger with a return ticket, alighting at his destination at the end of the return journey, was hurt by reason of the carriages being unsuitable to the height of the platform at that station. This station and platform belonged to one company (the South Western), by whose clerk the plaintiff's ticket had been issued: the train belonged to another company (the District), who used the station and adjoining line under running powers. There was an agreement between the two companies whereby the profits of the traffic were divided. The plaintiff sued the District Company, and it was held that they were liable to him even if his contract was with the South Western Company alone. The District Company received him as a passenger in their train, and were bound to provide carriages not only safe and sound in themselves, but safe with reference to the permanent wav and appliances of the line. In breach of this duty they provided, according to the facts as determined by the jury, a train so ordered that "in truth the combined arrangements were a trap or snare," and would have given the plaintiff a cause of action though he had been carried gratuitously. He had been actually received by the defendants as a passenger, and thereby they undertook the duty of not exposing him to unreasonable peril in any matter incident to the journey.

(c) There may be two causes of action with a common defendant, or the same act or event which makes A. liable for a breach of contract to B. may make him liable for a tort to Z.

The case already mentioned of the servant travelling by railway with his master would be an example of this if it were determined, on any particular state of facts, that the railway company contracted only with the master. They would not be less under a duty to the servant, and liable for a breach thereof, because they might also be liable to the master for other consequences, on the ground of a breach of their contract with him.

# 3. — Causes of Action in Tort dependent on a Contract not between the same Parties.

(a) When a binding promise is made, an obligation is created which remains in force until extinguished by the performance or discharge of the contract. Does the duty thus owed to the promisee constitute the object of a kind of real right which a stranger to the contract can infringe, and thereby render himself answerable ex delicto? It was decided by the Court of Queen's Bench in Lumley v. Gye (1853), and by the Court of Appeal in Bowen v. Hall (1881), that an action lies, under certain conditions, for procuring a third person to break his contract with the plaintiff.

First, actual damage must be alleged and proved. This at once shows that the right violated is not an absolute and independent one like a right of property, for the possibility of a judgment for nominal damages is in our law the touchstone of such rights. Where specific damage is necessary to support an action, the right which has been infringed cannot be a right of property, though in some cases it may be incident to property.

Next, the defendant's act must be malicious, in the sense of being aimed at obtaining some advantage for himself at the plaintiff's expense, or at any rate at causing loss or damage to the plaintiff. Mere knowledge that there is a subsisting contract will not do. In the decided cases the defendant's object was to withdraw from a rival in business and procure for himself the services of a peculiarly skilled person, — in the earlier case, an operatic singer; in the later, a craftsman, to whom, in common with only a few others, a particular process of manufacture was known.

The general habit of the law is not to regard motive as distinguished from intent; but there are well established exceptions to it, of which the action for malicious prosecution is the most conspicuous. The malicious procuring of a breach of contract, or of certain kinds of contracts, forms one more exception.

In America the decision in Lumley v. Gye has been followed in Massachusetts and elsewhere, and is generally accepted, with some such limitation as here maintained. The rule "does not apply to a case of interference by way of friendly advice, hon-

<sup>1 2</sup> E. & B. 216; 22 L. J. Q. B. 463; by Crompton, Erle, and Wightman, JJ.; diss. Coleridge, J.

<sup>&</sup>lt;sup>2</sup> 6 Q. B. Div. 333; by Lord Selborne, L. C., and Brett, L. J.; diss. Lord Coleridge, C. J.

estly given; nor is it in denial of the right of free expression of opinion."

(b) A breach of contract, as such, will generally not be a cause of action for a stranger. And on this pinciple it is held by our courts that where a message is incorrectly transmitted by the servants of a telegraph company, and the person to whom it is delivered thereby sustains damage, that person has not any remedy against the company. For the duty to transmit and deliver the message arises wholly out of the contract with the sender, and there is no duty towards the receiver. Wilful alteration of a message might be the ground of an action for deceit against the person who altered it, as he would have knowingly made a false statement as to the contents of the message which passed through his hands. But a mere mistake in reading off or transmitting a letter or figure, though it may materially affect the sense of the despatch, cannot be treated as a deceit.

"In America, on the other hand, one who receives a telegram which, owing to the negligence of the telegraph company, is altered or in other respects untrue, is invariably permitted to maintain an action against the telegraph company for the loss that he sustains through acting upon that telegram." In the present writer's opinion the American decisions, though not all the reasons given for them, are on principle correct.

(c) There are likewise cases where an innocent and

even a prudent person will find himself within his right, or a wrong-doer, according as there has or has not been a contract between other parties under which the property or lawful possession of goods has been transferred. If a man fraudulently acquires property in goods, or gets delivery of possession with the consent of the true owner, he has a real though a defeasible title, and at any time before the contract is avoided (be it of sale or any form of bailment) he can give an indefeasible title by delivery over to a buyer or lender for valuable consideration given in good faith. On the other hand a man may obtain the actual control and apparent dominion of goods

not only without having acquired the property, but without any rightful transfer of possession. He may obtain possession by a

mere trick, for example, by pretending to be another person with whom the other party really intends to deal, or the agent of that person. In such a case a third person, even if he has no means of knowing the actual possessor's want of title, cannot acquire a good title from him unless the sale is in market overt, or the transaction is within some special statutory protection, as that of the Factors' Acts. He deals, however innocently, at his peril.

## 4. - Measure of Damages and other Incidents of the Remedy.

With regard to the measure of damages, the same principles are to a great extent applicable to cases of contract and of tort, and even rules which are generally peculiar to one branch of the law may be applied to the other in exceptional classes of cases.

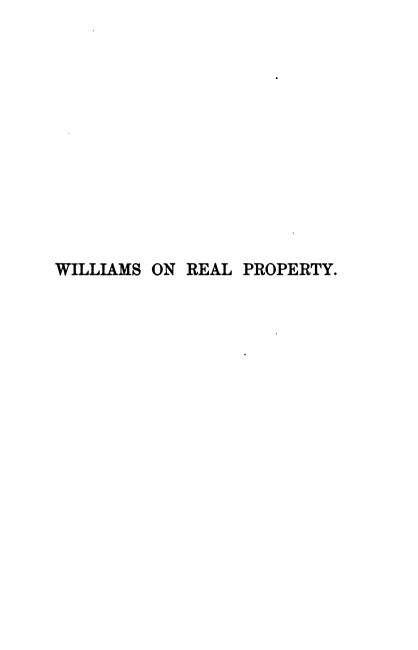
The liability of a wrong-doer for his act is determined by the extent to which the harm suffered by the plaintiff was a natural and probable consequence of the act. It seems on the whole that this is also the true measure of liability for breach of contract; the judgment of what is natural and probable being taken as it would have been formed by a reasonable man in the defendant's place at the date of the wrongful act, or the conclusion of the contract, as the case may be.

Exemplary or vindictive damages, as a rule, cannot be recovered in an action on a contract, and it makes no difference that the breach of contract is a misfeasance capable of being treated as a wrong. Actions for breach of promise of marriage are an exception, perhaps in law, certainly in fact. Like results might conceivably follow in the case of other breaches of contract accompanied with circumstances of wanton injury or contumely.

In another respect breach of promise of marriage is like a tort: executors cannot sue for it without proof of special damage to their testator's personal estate. "Executors and administrators are the representatives of the temporal property, that is, the debts and goods of the deceased, but not of their wrongs, except where those wrongs operate to the temporal injury of their personal estate. But in that case the special damage ought to be

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stated on the record; otherwise the court cannot intend it." The same rule appears to hold as concerning injuries to the person caused by unskilful medical treatment, negligence of carriers of passengers or their servants, and the like, although the duty to be performed was under a contract. Positive authority, however, has not been found on the extent of this analogy.





# WILLIAMS ON REAL PROPERTY.

# THE LAW OF REAL PROPERTY.

#### INTRODUCTORY CHAPTER.

OF THE CLASSES OF PROPERTY.

Movable and immovable is one of the simplest and most natural divisions of property in times of but partial civilization. In our law this division has been brought into great prominence by the circumstances of our early history.

By the Norman conquest a vast number of Norman soldiers settled in this country. The new settlers were encouraged by their king and master; and whilst the conquered Saxons found no favor at court, they suffered a more substantial grievance in the confiscation of the lands of such of them as had opposed the Conqueror. lands thus confiscated were granted out by the Conqueror to his followers, nor was their rapacity satisfied till the greater part of the lands in the kingdom had thus been disposed of. In these grants the Norman king and his vassals followed the customs of their own country, or what is called the feudal system. The lands granted were not given freely and for nothing; but they were given to hold of the king, subject to the performance of certain military duties as the condition of their en-The king was still considered as in some sense the proprietor, and was called the lord paramount; while the services to be rendered were regarded as incident or annexed to the ownership of the land; in fact, as the rent to be paid for it.

This feudal system of tenures, or holding of the king, was soon afterward applied to all other lands, although they had not been thus granted out, but remained in the hands of their original Saxon owners.

The system of tenure could evidently only exist as to lands and things immovable. Cattle and other movables were things of too perishable and insignificant a nature to be subject to any feudal liabilities, and could therefore only be bestowed as absolute gifts. No duty or service could well be annexed as the condition of their ownership. Hence a superiority became attached to all immovable property, and the distinction between it and movables became clearly marked.

Lands, houses, and immovable property, — things capable of being held in the way above described, — were called tenements or things held. They were also denominated hereditaments, because, on the death of the owner, they devolve by law to his heir. So that the phrase, "lands, tenements, and hereditaments," was used by the lawyers of those times to express all sorts of property of the first or immovable class; and the expression is in use to the present day.

The other, or movable class of property, was known by the name of goods or chattels.

In time, from various causes, the feudal system began to give way. The growth of a commercial spirit, the rising power of towns, and the formation of an influential middle class. combined to render the relation of lord and vassal anything but a reciprocal advantage: and at the restoration of King Charles II. a final blow was given to the whole system. form indeed remained, but its spirit was extinguished. The tenures of land then became less burdensome to the owner, and the courts of law, instead of being occupied with disputes between lords and tenants, had their attention more directed to controversies It became then more obvious that the between different owners. essential difference between lands and goods was to be found in the remedies for the deprivation of either; that land could always be restored, but goods could not; that, as to the one, the real land itself could be recovered; but as to the other, proceedings must be had against the person who had taken them away. great classes of property accordingly began to acquire two other names more characteristic of their difference. The remedies for the recovery of lands had long been called real actions, and the remedies for loss of goods personal actions. But it was not until the feudal system had lost its hold, that lands and tenements were called real property, and goods and chattels personal property.

It appears, then, that lands and tenements were designated, in later times, real property, more from the nature of the legal remedy for their recovery than simply because they are real things; and, on the other hand, goods and chattels were called personal property because the remedy for their abstraction was against the person who had taken them away. Personal property has been described as that which may attend the owner's person wherever he thinks proper to go; but goods and chattels were not usually called things personal till they had become too numerous and important to attend the persons of their owners.

The terms "real property" and "personal property" are now more commonly used than the old terms "tenements" and "hereditaments," "goods," and "chattels." Both classes of property have since the feudal times been increased by fresh additions; and within the new names of real and personal many kinds of property are now included, to which our forefathers were quite strangers; so much so that the simple division into immovable tenements and movable chattels is lost in the many exceptions to which time and altered circumstances have given rise. Thus, shares in canals and railways, which are sufficiently immovable, are generally personal property; funded property is personal; whilst a dignity or title of honor, which one would think to be as locomotive as its owner, is not a chattel but a tenement.

But the most remarkable exception to the original rule occurs in the case of a lease of lands or houses for a term of years. The interest which the lessee, or person who has taken the lease, possesses, is not his real, but his personal property; it is but a chattel, though the rent may be only nominal, and the term ninety or even a thousand years.

Real property still retains many of its ancient laws, which invest it with an interest and importance to which personal property has no claim. Of these ancient laws one of the most conspicuous is the feudal rule of descent, under which, as partially modified by amending acts, real property goes, when its owner dies intestate, to his heir, while personal property is dis-

tributed, under the same circumstances, amongst the next of kin of the intestate by an administrator appointed for that purpose by the proper court.

Besides the division of property into real and personal, there is another classification, namely, that of corporeal and incorporeal. All property is either of one of these classes or of the other; it is either visible and tangible, or it is not. Thus a house is corporeal, but the annual rent payable for its occupation is incorporeal.

In many cases property of an incorporeal nature exists apart from the ownership of anything corporeal, forming a distinct subject of possession; and, as such, it may frequently be required to be transferred from one person to another. In the transfer or conveyance of incorporeal property, when thus alone and self-existent, formerly lay the practical distinction between it and corporeal property. For, in ancient times, the impossibility of actually delivering up anything of a separate incorporeal nature rendered some other means of conveyance necessary. The most obvious was writing; which was accordingly always employed for the purpose, and was considered indispensable to the separate transfer of everything incorporeal; whilst the transfer of corporeal property, together with such incorporeal rights as its possession involved, was long permitted to take place without any written document.

# PART I.

#### OF CORPOREAL HEREDITAMENTS.

Definition of Terms. — A house is by lawyers generally called a messuage. Both the term messuage and house will comprise adjoining outbuildings, the orchard, and curtilage, and, according to the better opinion, these terms will include the garden also.

The word tenement is often used in law, as in ordinary language, to signify a house: it is indeed the regular synonym which follows the term messuage; a house being usually described in deeds as "all that messuage or tenement." But the more comprehensive meaning of the word tenement is still attached to it in legal interpretation, whenever the sense requires.

Again, the word land comprehends in law any ground, soil, or earth whatsoever; but its strict and primary import is arable land. It will, however, include castles, houses, and buildings of all kinds; for the ownership of land carries with it everything both above and below the surface, the maxim being cujus est solum, ejus est usque ad cœlum. A pond of water is accordingly described as land covered with water; and a grant of land includes all mines and minerals [except gold and silver] under the surface. This extensive signification of the word land may, however, be controlled by the context. So mines lying under a piece of land may be excepted out of a conveyance of such land, and they will then remain the corporeal property of the grantor.

The word premises is frequently used in law in its proper etymological sense of that which has been before mentioned. Thus, after a recital of various facts in a deed, it frequently proceeds "in

consideration of the *premises*," meaning in consideration of the facts before mentioned; and property is seldom spoken of as *premises*, unless a description of it is contained in some prior part of the deed.

Most of the words used in the description of property have however no special technical meaning, but are construed according to their usual sense; and, as to such words as have a technical import more comprehensive than their ordinary meaning, it is very seldom that such extensive import is alone relied on; but the meaning of the parties is generally explained by the additional use of ordinary words.

# CHAPTER I.

#### OF AN ESTATE FOR LIFE.

The idea of absolute ownership of land is quite unknown to the English law. No man is in law the absolute owner of lands. He can only hold an estate in them.

Estates for life are either conventional, or expressly created by the act of the parties, or merely legal, or created by construction and operation of law. In either case such an estate is created where lands or tenements become vested in a man to hold for the term of his own life or for the life of any other person or persons.

A grant to A.B. simply confers but an estate for his life, which estate, though he may part with it, if he pleases, will terminate at his death, into whosesoever hands it may have come.

The most remarkable effect of this antiquated rule has [when not changed by statute] been its frequent defeat of the intentions of unlearned testators, who, in leaving their lands and houses to the objects of their bounty, were seldom aware that they were conferring only a life interest. Lord Mansfield says, "The distinction, which is now clearly established, is this: If the words of the testator denote only a description of the specific estate or land devised, in that case, if no words of limitation are added, the devisee has only

an estate for life. But if the words denote the quantum of interest or property that the testator has in the lands devised, then the whole extent of such his interest passes by the gift to the devisee. The question, therefore, is always a question of construction, upon the words and terms used by the testator." [The common-law rule has been changed by statute in many of the States.]

If the owner of an estate for his own life should dispose thereof. the new owner will become entitled to an estate for the life of the former. This, in the Norman French, is called an estate pur autre vie: and the person for whose life the land is holden is called the cestui que vie. In this case, as well as in that of an original grant, the new owner was formerly entitled only so long as he lived to enjoy the property, unless the grant were expressly extended to his heirs; so that, in case of the decease of the new owner, in the lifetime of the cestui que vie, the land was left without an occupant so long as the life of the latter continued, for the law would not allow him to re-enter after having parted with his life estate. No person having therefore a right to the property. anybody might enter on the land; and he that first entered might lawfully retain possession so long as the cestui que vie lived. person who had so entered was called a general occupant. [This defect in the law has very generally, perhaps universally, been remedied by statute. If, however, the estate had been granted to a man and his heirs during the life of the cestui que vie, the heir might, and still may, enter and hold possession, and in such a case he is called in law a special occupant, having a special right of occupation by the terms of the grant.

The owner of an estate for life is called a tenant for life, for he is only a holder of the lands according to the feudal principles of our law. A tenant, either for his own life or for the life of another (pur autre vie), hath an estate of freehold, and he that hath a less estate cannot have a freehold. Here, again, the reason is feudal. A life estate is such as was considered worthy the acceptance of a free man; a less estate was not.

There are now some estates which may not even last a lifetime, but are yet considered in law as life estates, and are estates of free-hold. Thus, an estate granted to a woman during her widowhood is in law a life estate, though determinable on her marrying again.

Every tenant for life, unless restrained by covenant or agreement, has the common right of all tenants to cut wood for fuel to burn in the house, for the making and repairing of all instruments of husbandry, and for repairing the house, and the hedges and fences, and also the right to cut underwood and lop pollards in due course. But he is not allowed to cut timber or to commit any other kind of waste, either by voluntary destruction of any part of the premises, which is called voluntary waste, or by permitting the buildings to go to ruin, which is called permissive waste.

A tenant for life is now liable only to damages in an action at law for waste already done, or to be restrained by an injunction by a suit in equity from cutting the timber or committing any other act of waste, which he may be known to contemplate. If, however, the estate is given to the tenant by a written instrument expressly declaring his estate to be without impeachment of waste, he is allowed to cut timber in a husbandlike manner for his own benefit, to open mines, and commit other acts of waste with impunity; but so that he does not pull down or deface the family mansion, or fell timber planted and growing for ornament, or commit other injuries of the like nature; all of which are termed equitable waste; for the Court of Chancery administering equity will restrain such proceedings.

As a tenant for life has merely a limited interest, he cannot of course make any disposition of the lands to take effect after his decease; and, consequently, he can make no leases to endure beyond his own life, unless he be specially empowered so to do by the deed under which he holds.

If a tenant for life should sow the lands and die before harvest, his executors will have a right to the
emblements or crop. And the same right will also belong to his
under-tenant; with this difference, however, that if the life estate
should determine by the tenant's ourn act, as by the marriage of a
widow holding during her widowhood, the tenant would have no
right to emblements; but the under-tenant, being no party to the
cesser of the estate, would still be entitled in the same manner
as on the expiration of the estate by death.

In addition to estates for life expressly created by the acts of the parties, there are certain life interests, created by construction and operation of law, possessed by husbands and wives in each other's land. These interests will be spoken of in a future chapter.

### CHAPTER II.

#### OF AN ESTATE TAIL.

An estate tail is an estate given to a man and the heirs of his body. This is such an estate as will, if left to itself, descend, on the decease of the first owner, to all his lawful issue, children, grandchildren, and more remote descendants, so long as his posterity endures, - in a regular order and course of descent from one to another; and, on the other hand, if the first owner should die without issue, his estate, if left alone, will then determine. An estate tail may be either general, that is, to the heirs of his body generally and without restriction, in which case the estate will be descendible to every one of his lawful posterity in due course; or special, when it is restrained to certain heirs of his body. and does not go to all of them in general; thus, if an estate be given to a man and the heirs of his body by a particular wife: here none can inherit but such as are his issue by the wife specified. Estates tail may be also in tail male, or in tail female: an estate in tail male cannot descend to any but males, and male descendants of males; so an estate in tail female can only descend to females, and female descendants of females.

The owner of an estate tail is called a donee in tail, and the person who has given him the estate tail is called the donor. And here it may be remarked that such correlative words as donor and donee, lessor and lessee, and many others of a like termination, are used in law to distinguish the

<sup>&</sup>lt;sup>1</sup> Very generally abolished in the United States, or changed into estatés in fee simple. In some instances the first taker has a life estate, with remainder in fee simple to the next taker. See Rev. Stat. Iil., c. 30, s. 6.

person from whom an act proceeds, from the person for or towards whom it is done.

The owner of an estate tail is also called a tenant in tail, for he is as much a holder as a tenant for life. But an estate tail is a larger estate than an estate for life, as it may endure so long as the first owner of the estate has any issue of the kind mentioned in the gift. It is consequently an estate of freehold.

From the time of Bracton, a gift to a man and his heirs generally has enabled the grantee either entirely to defeat the expectation of his heir by an absolute conveyance, or to prejudice his enjoyment of the descended lands by obliging him to satisfy any debts or demands, to the value of the lands, according to his ancestor's discretion.

With respect to lands granted to a man and the heirs of his body, the power of the ancestor is not now so complete.

During the reign of Henry III. it seems to have been established that, in whatever form the grant was made, the fact of the existence of an expectant heir enabled the tenant to alienate, not only as against his heirs, but also as against the lord. If therefore lands were given to a man and his heirs, he could at once dispose of them; and if lands were granted to a man and the heirs of his body, he was able, the moment he had issue born — that is, the moment he had expectant heirs of the kind mentioned in the gift — to alienate the lands; and the alienee and his heirs had a right to hold, not only during the existence of the issue, but also after their failure. The original intention of such gifts was therefore in a great measure defeated; originally, on failure of the issue the lands reverted to the donor; but now nothing was requisite but the mere birth of issue to give the donee a complete power of disposition.

To remedy the supposed evils consequent upon this state of facts, and to keep up that feudal system which landlords ever held in high esteem, it was enacted in the reign of Edward I. by the famous statute De Donis Conditionalibus, — that the will of the donor, according to the form in the deed of gift manifestly expressed, should be from thenceforth observed; so that they to whom the tenement was given should have no power

to alien it, whereby it should fail to remain unto their own issue, after their death, or to revert unto the donor or his heirs, if issue should fail.

Since the passing of this statute, an estate given to a man and the heirs of his body has been always called an estate tail, or, more properly, an estate in fee tail (feudum talliatum). The word fee (feudum) anciently meant any estate feudally held of another person: but its meaning is now confined to estates of inheritance. - that is, to estates which may descend to heirs; so that a fee may now be said to mean an inheritance. The word tail is derived from the French word tailler, to cut, the inheritance being, by the statute De Donis, cut down and confined to the heirs of the body strictly; but, though an estate tail still bears a name indicative of a restriction of the inheritance from any interruption in its course of perpetual descent from father to son, we shall find that in fact the right to establish such exclusive perpetual descent has long since been abolished, although the statute remained in force about 200 years. The power of alienation was once more introduced, by means of a decision of the judges, in a case which occurred in the twelfth year of the reign of King Edward IV. In this case, called Taltarum's Case, the destruction of an entail was accomplished by judicial proceedings [called a common recovery] collusively taken against a tenant in tail for the recovery of the lands entailed.

The tenant in tail, on a collusive action being brought against him, was allowed to bring into court some third person, presumed to have been the original grantor of the estate tail. The tenant then alleged that this third person had warranted the title; and accordingly begged that he might defend the title which he had so warranted. This third person was accordingly called on; who, in fact, had had nothing to do with the matter; but, being a party in the scheme, he admitted the alleged warranty, and then allowed judgment to go against himself by default. Whereupon judgment was given for the demandant or plaintiff, to recover the lands from the tenant in tail; and the tenant in tail had judgment empowering him to recover a recompense in lands of equal value from the defaulter, who had thus failed in defending his title. If any such lands had been recovered under the judgment, they would have been held by the tenant for an estate tail, and would have descended to the issue, in lieu of those which were lost by the warrantor's default. But the defaulter, on whom the burden was thus cast, was a man who had no lands to give, some man of

straw, who could easily be prevailed on to undertake the responsibility; and, in later times, the crier of the court was usually employed. So that, whilst the issue had still the judgment of the court in their favor, unfortunately for them it was against the wrong person; and virtually their right was defeated, and the estate tail was said to be barred. Not only were the issue barred of their right, but the donor, who had made the grant, and to whom the lands were to revert on failure of issue, had his reversion barred at the same time. So also all estates which the donor might have given to other persons, expectant on the decease of the tenant in tail without issue (and which estates are called remainders expectant on the estate tail), were equally barred. The demandant, in whose favor judgment was given, became possessed of an estate in fee simple in the lands; an estate the largest allowed by law, and bringing with it the fullest powers of alienation, and the demandant, being a friend of the tenant in tail, of course disposed of the estate in fee simple according to his wishes.

In the year 1833, common recoveries were abolished by act of Parliament. In their place was substituted a simple deed, executed by the tenant in tail and enrolled in the Court of Chancery; by such a deed, a tenant in tail in possession is now enabled to dispose of the lands entailed for an estate in fee simple.

A common recovery was not, in later times, the only way in which an estate tail might be barred. There was another assurance as effectual in defeating the claim of the issue, though it was inoperative as to the remainders and reversion. This assurance was a fine. They were not, like recoveries, actions at law carried out through every stage of the process; but were fictitious actions, commenced and then compromised by leave of the court, whereby the lands in question were acknowledged to be the right of one of the parties.

It is important to observe that an estate tail can only be barred by an actual conveyance by deed, duly enrolled according to the act of Parliament by which a deed was substituted for a common recovery or fine.

A tenant in tail may cut down timber for his own benefit, and commit what waste he pleases, without the necessity of barring the entail for that purpose.

# CHAPTER III.

## OF AN ESTATE IN FEE SIMPLE.

An estate in fee simple (feudum simplex) is the greatest estate or interest which the law of England allows any person to possess in landed property. A tenant in fee simple is he that holds lands or tenements to him and his heirs; so that the estate is descendible, not merely to the heirs of his body, but to collateral relations, according to the rules and canons of descent. An estate in fee simple is of course an estate of freehold, being a larger estate than either an estate for life or in tail.

It is not, however, the mere descent of an estate in fee simple to collateral heirs that has given to this estate its present value and importance: the unfettered right of alienation, which is now inseparably incident to this estate, is by far its most valuable quality.

The statute by which this right was granted is known by the name of the statute of Quia emptores: 1 so called from the words with which it commences. It enacts that from thenceforth it shall be lawful to every freeman to sell at his own pleasure his lands and tenements or part thereof, so nevertheless that the feoffee (or purchaser) shall hold the same lands or tenements of the same chief lord of the fee, and by the same services and customs, as his feoffor held them before. And it further enacts that if he sell any part of such his lands or tenements to any person, the feoffee shall hold that part immediately of the chief lord, and shall be forthwith charged with so much service as pertaineth, or ought to pertain, to the said chief lord, for such part, according to the quantity of the land or tenement so sold. This statute did not extend to those who held of the king as tenants in capite, who were kept in restraint for some time longer. Free liberty of alienation was however subsequently acquired by them; and the right of disposing of an estate

<sup>1</sup> Stat. 18 Edw. I., c. 1.

in fee simple, by act inter vivos, is now the undisputed privilege of every tenant of such an estate.

The alienation of lands by will was not allowed in this country, from the time the feudal system became completely rooted, until many years after alienation inter vivos had been sanctioned by the statute of Quia emptores. The city of London, and a few other favored places. formed exceptions to the general restraint on the power of testamentary alienation of estates in fee simple; for in these places tenements might be devised by will, in virtue of a special custom. In process of time, however, a method of devising lands by will was covertly adopted by means of conveyances to other parties. to such uses as the person conveying should appoint by his will. This indirect mode of devising lands was intentionally restrained by the operation of a statute, passed in the reign of King Henry VIII., known by the name of the Statute of Uses. But only five years after the passing of this statute, lands were by a further statute expressly rendered devisable by will. This great change in the law was effected by statutes of the 32d and 34th of Henry VIII. But even by these statutes the right to devise was partial only, as to lands of the then prevailing tenure; and it was not till the restoration of King Charles II., when the feudal tenures were abolished, that the right of devising freehold lands by will became complete and universal.

At the present day, every tenant in fee simple so fully enjoys the right of alienating the lands he holds, either in his lifetime or by his will, that most tenants in fee think themselves to be the lords of their own domains; whereas, in fact, all land-owners are merely tenants in the eye of the law, as will hereafter more clearly appear.

With respect to certain persons, exceptions occur to the right of alienation. Thus if an alien or foreigner, who is under no allegiance to the crown, were to purchase an estate in lands, the crown might at any time assert a right to such estate; unless it were merely a lease taken by a subject of a friendly state for the residence or occupation of himself or his servants, or the purpose of any business, trade, or manufacture, for a term not exceeding twenty-one years. [This rule is abolished by statute in the United States.]

Infants, or all persons under the age of twenty-one years, and also idiots and lunatics, though they may hold lands, are incapacitated from making a binding disposition of any estate in them. The conveyances of infants are generally voidable only, and those of lunatics and idiots appear to be absolutely void. [The better opinion is that they are voidable only.]

Married women are under a limited incapacity to alienate, as will hereafter appear. And persons attainted for treason or felony cannot, by any conveyance which they might make, defeat the right to their estates which their attainder gave to the crown, or to the lord of whom their estates were holden. [See, however, United States and State Constitutions.]

By a statute of the reign of Elizabeth, conveyances of landed estates and also of goods, made for the purpose of delaying, hindering, or defrauding creditors, are void as against them; unless made upon good, which here means valuable, consideration, and bona fide, to any person not having at the time of the conveyance any notice of such fraud. And, by a subsequent statute of the same reign, voluntary conveyances of any estate in lands, tenements, or other hereditaments whatsoever, and conveyances of such estates made with any clause of revocation at the will of the grantor, are also void as against subsequent purchasers for money or other valuable consideration.

As a tenant in fee simple may alienate his estate at his pleasure, so he is under no control in his management of the lands, but may open mines, cut timber, and commit waste of all kinds, grant leases of any length, and charge the lands with the payment of money to any amount.

Fee simple estates are moreover subject, in the hands of the heir or devisee, to debts of all kinds contracted by the deceased tenant. [In the United States such estates may be sold upon execution against the tenant, and a legal title thereby passed during the life of the tenant.]

Actions at law and suits in equity respecting the lands will also bind a purchaser as well as the heir or devisee; that is, he must abide by the result, although he may be ignorant that any such proceedings are depending.

Another instance of involuntary alienation for the payment of debts occurs on the bankruptcy of a trader, in which event the whole of his freehold, as well as his personal estate, is vested in his assignees, by virtue of their appointment, in trust for the whole body of his creditors. [There is now no general bankrupt law in the United States.]

So inherent is the right of alienation of all estates (except estates tail, in which, as we have seen, the right is only of a modified nature), that it is impossible for any owner, by any means, to divest himself of this right. And in the same manner the liability of estates to involuntary alienation for payment of debts cannot by any means be got rid of. When, however, lands or property are given by one person for the benefit of another, it is possible to confine the duration of the gift within the period in which it can be personally enjoyed by the grantee. Thus land or any other property may be given to trustees in trust for A. until he shall dispose of the same, or shall become bankrupt, or until any act or event shall occur whereby the property might belong to any other person or persons; and this is frequently done. though another person may make such a gift for A.'s benefit, A. would not be allowed to make such a disposition of his own property in trust for himself. An exception to this rule of law occurs in the case of a woman, who is permitted by the Court of Chancery to have property settled upon her in such a way that she cannot when married make any disposition of it during the coverture or marriage; but this mode of settlement is of comparatively modern date.

If the tenant in fee simple should not have disposed of his estate in his lifetime, or by his will, and if it should not be swallowed up by his debts, and if he should not have been either traitor or murderer, his lands will descend (subject to any rights of his wife) to the heir at law. The heir is a person appointed by the law. He is called into existence by his ancestor's decease, for no man during his lifetime can have an heir. An heir at law is the only person in whom the law of England vests property, whether he will or not. An heir at law, immediately on the decease of his ancestor, becomes presumptively possessed, or

seised in law, of all his lands. No disclaimer that he may make will have any effect, though, of course, he may, as soon as he pleases, dispose of the property by an ordinary conveyance.

# CHAPTER IV.

## OF THE DESCENT OF AN ESTATE IN FEE SIMPLE.

- 1. The first rule of descent by the common law is that inheritances shall lineally descend to the issue of the person who last died, actually seised, in infinitum, but shall never lineally ascend. [Changed by statute in England and the United States. The student should at this point consult the statutes of the State in which he proposes to practise.]
- 2. The second rule is, that the male issue shall be admitted before the female. [Not so in the United States.]
- 3. The third rule is, that where two or more of the male issue are in equal degree of consanguinity to the purchaser, the eldest only shall inherit; but the females shall inherit all together. [Primogeniture does not prevail in the United States.]
- 4. The fourth rule is, that all the lineal descendants in infinitum of any person deceased shall represent their ancestor; that is, shall stand in the same place as the person himself would have done had he been living.
- 5. The fifth rule at the common law is, that on failure of lineal descendants, or issue of the person last seised, the inheritance shall descend to his collateral relations being of the blood of the first purchaser, subject to the three preceding rules. [Changed by statute in England and the United States.]
- 6. The sixth rule of descent at the common law is that the collateral heir of the person last seised must be his next collateral kinsman of the whole blood. [Changed by statute both in England and the United States.]
- 7. The seventh rule is that in collateral inheritances the male stocks shall be preferred to the female, that is,

kindred derived from the blood of the male ancestors, however remote, shall be admitted before those of the blood of the female, however near, — unless where the lands have in fact descended from a female. [Not the law in the United States.]

The above rules of descent apply exclusively to estates in land, and to that kind of property which is denominated real, and have no application to money or other personal estate, which is distributed on intestacy according to the provisions of the Statute of Distributions.

# CHAPTER V.

#### OF THE TENURE OF AN ESTATE IN FEE SIMPLE.

THE most familiar instance of a tenure is given by a common lease of a house or land for a term of years; in this case the person letting is still called the landlord, and the person to whom the premises are let is the tenant; the terms of the tenure are according to the agreement of the parties, the rent being usually the chief item, and the rest of the terms of tenure being contained in the covenants of the lease; but, if no rent should be paid, the relation of the landlord and tenant would still subsist, though, of course, not with the same advantage to the landlord.

So, if a gift of land should be made to a man and the heirs of his body, the done in tail, as he is called, and his issue, would be the tenants of the donor as long as the entail lasted, and a freehold tenure would thus be created.

But if a gift should be made to a man and his heirs, or for an estate in fee simple, it would not now be lawful for the parties to create a tenure between themselves, as in the case of a gift for life, or in tail. For by the statute of *Quia emptores*, we have seen that it was enacted, that from henceforth it should be lawful for every free man to sell, at his own pleasure, his lands or tenements, or part thereof, so nevertheless, that the feoffee, or purchaser, should hold the same lands or tenements of the same chief

lord of the fee, and by the same services and customs as his feoffor. the seller, held them before. The giver or seller of an estate in fee simple is then himself but a tenant, with liberty of putting another in his own place. He may have under him a tenant for years, or a tenant for life, or even a tenant in tail, but he cannot now, by any kind of conveyance, place under himself a tenant of an estate in fee simple. The statute of Quia emptores now forbids any one from making himself the lord of such an estate; all he can do is to transfer his own tenancy; and the purchaser of an estate in fee simple must hold his estate of the same chief lord of the fee. as the seller held before him. This doctrine of tenures still prevails throughout the kingdom: for it is a fundamental rule that all the lands within this realm were originally derived from the crown (either by express grant or tacit intendment of law), and therefore the queen is sovereign lady, or lady paramount, either mediate or immediate, of all and every parcel of land within the realm. [In some of the United States statutes have declared lands to be allodial, but as a general rule the nature of the tenure is feudal.

The rent, services, and other incidents of the tenure of estates in fee simple were, in ancient times, matters of much variety, depending as they did on the mutual agreements which, previously to the statute of Quia emptores, the various lords and tenants made with each other; though still they had their general laws, governing such cases as were not expressly pro-The lord was usually a baron, or other person of power and consequence, to whom had been granted an estate in fee simple in a tract of land. Of this land he retained as much as was necessary for his own use, as his own demesne, and usually built upon it a mansion or manor house. Part of this demesne was in the occupation of the villeins of the lord, who held various small parcels at his will, for their own subsistence, and cultivated the residue for their lord's benefit. The rest of the cultivable land was granted out by the lord to various freeholders, subject to certain stipulated rents or services, as "to plough ten acres of arable land, parcel of that which remained in the lord's possession, or to carry his dung unto the land, or to go with him to war against the Scots." The barren lands which remained formed the lord's waste, over which the cattle

of the tenants were allowed to roam in search of pasture. In this way manors were created, every one of which is of a date prior to the statute of *Quia emptores*, except, perhaps, some which may have been created by the king's tenants in capite with license from the crown. The lands held by the villeins were the origin of copyholds. Those granted to the freemen were subject to various burdens, according to the nature of the tenure.

In the tenure by knight's service, then the most universal and honorable species of tenure, the tenant of an estate of inheritance, that is, of an estate of fee simple or fee tail, was bound to do homage to his lord, kneeling to him, professing to become his man, and receiving from him a kiss. The tenant was moreover at first expected, and afterwards obliged, to render to his lord pecuniary aids, to ransom his person if taken prisoner, to help him in the expense of making his eldest son a knight, and in providing a portion for his eldest daughter on her marriage. Again, on the death of a tenant, his heir was bound to pay a fine, called a relief, on taking to his ancestor's estate. If the heir were under age, the lord had, under the name of wardship, the custody of the body and lands of the heir, without account of the profits, till the age of twenty-one years in males and sixteen in females; when the wards had a right to require possession, or sue out their livery, on payment to the lord of half a year's profits of their lands. In addition to this, the lord possessed the right of marriage (maritagium), or of disposing of his infant wards in matrimony, at their peril of forfeiting to him, in case of their refusing a suitable match, a sum of money equal to the value of the marriage; that is, what the suitor was willing to pay down to the lord as the price of marrying his ward; and double the market value was to be forfeited, if the ward presumed to marry without the lord's consent. The king's tenants in capite were moreover subject to many burdens and restraints, from which the tenants of other lords were exempt.

There is now only one kind of tenure by which an estate in fee simple can be held; and that is the tenure of free and common socage. The owners of fee simple estates, held by this tenure, were not villeins or slaves, but freemen, hence the term free socage. No military service was due, as the condition of the enjoyment of the estates. Homage to the lord, the invariable incident to the military tenures, was not often required; but the services, if any, were usually of an agricultural nature: a fixed rent was sometimes reserved; and in process of time the agricultural services appear to have been very generally commuted into such a rent. In all cases of annual rent, the relief paid by the heir, on the death of his ancestor, was fixed

at one year's rent. Frequently no rent was due : but the owners were simply bound to take, when required, the oath of fealty to the lord of whom they held, to do suit at his court, if he had one, and to give him the customary aids for knighting his eldest son and marrying his eldest daughter. This tenure was accordingly more beneficial than the military tenures, by which fee simple estates, in most other lands in the kingdom, were held. True, the actual military service, in respect of lands, became gradually commuted for an escuage or money payment, assessed on the tenants by knight's service from time to time, first at the discretion of the Crown, and afterwards by authority of Parliament; and this commutation appears to have generally prevailed from so early a period as the time of Henry II. But the great superiority of the socage tenure was still felt in its freedom from the burdens of wardship and marriage, and other exactions, imposed on the tenants of estates in fee held by the other tenures.

At the restoration of King Charles II., an act of Parliament [12 Car. II. c. 24 (1660)] was insisted on and obtained, by which all tenures by knight's service, and the fruits and consequences of tenures in capite, were taken away, and all tenures of estates of inheritance in the hands of private persons (except copyhold tenures) were turned into free and common socage; and the same were forever discharged from homage, wardships, values, and forfeitures of marriage, and other charges incident to tenures by knight's service, and from aids for marrying the lord's daughter and for making his son a knight.

A rent is not now often paid in respect of the tenure of an estate in fee simple. When it is paid, it is usually called a quit rent, and is almost always of a very trifling amount. The relief of one year's quit rent, payable by the heir on the death of his ancestor, in the case of a fixed quit rent, was not abolished by the statute of Charles, and such relief is accordingly still due. Suit of court also is still obligatory on tenants of estates in fee simple, held of any manor now existing. And the oath of fealty still continues an incident of tenure, as well of an estate in fee simple as of every other estate, down to a tenancy for a mere term of years; but in practice it is seldom or never exacted.

There is yet another incident of the tenure of estates in fee simple, namely the right of escheat; by which, if the estate happens to end, the lands revert to the lord, by whose ancestors or predecessors they were anciently granted to the tenant. When the tenant of an estate in fee simple dies, without having alienated his estate in his lifetime, or by his will, and without leaving any heirs, either lineal or collateral, either of the purchaser or of the person last entitled to the lands, such lands escheat (as it is called) to the lord of whom he held them.

A small occasional quit-rent, with its accompanying relief, — suit of the court Baron, if any such exists, — an oath of fealty never exacted, — and a right of escheat seldom accruing, — are now, it appears, therefore, the ordinary incidents of the tenure of an estate in fee simple. [In perhaps a few of the older States ground rents are sometimes reserved on a conveyance in fee; these, where they exist, and escheats, though rarely occurring, are about the only incidents of feudal tenure existing in the United States. This tenure, however, has dictated the terminology of the law of real estate, and must be studied in order to understand the existing law upon this subject.]

### CHAPTER VI.

OF JOINT TENANTS 1 AND TENANTS IN COMMON.

A gift of lands to two or more persons in joint tenancy is such a gift as imparts to them, with respect to all other persons than themselves, the properties of one single owner. As between themselves, they must, of course, have separate rights; but such rights are equal in every respect, it not being possible for one of them to have a greater interest than another in the subject of the tenancy. A joint tenancy is accordingly said to be distinguished by unity of

<sup>&</sup>lt;sup>1</sup> Joint tenancy has been abolished or modified by statute in most, if not all, of the United States.

possession, unity of interest, unity of title, and unity of the time of the commencement of such title.

Any estate may be held in joint tenancy: thus, if lands be given to A. and B., and the heirs of their two bodies; here, if A. and B. be persons who may possibly intermarry, they will have an estate in special tail, descendible only to the heirs of their two bodies: so long as they both live, they will be entitled to the rents and profits in equal shares; after the decease of either, the survivor will be entitled for life to the whole; and, on the decease of such survivor, the heir of their bodies, in case they should have intermarried, will succeed by descent, in the same manner as if both A, and B, had been but one ancestor. If, however, A. and B. be persons who cannot at any time lawfully intermarry, as, if they be brother and sister, or both males, or both females, a gift to them and the heirs of their two bodies will receive a somewhat different construction. So long as it is possible for a unity of interest to continue, the law will carry it into effect: A. and B. will accordingly be regarded as one person, and will be entitled jointly during While they both live their rights will be equal; and, on the death of either, the survivor will take the whole, so long as he may live. But, as they cannot intermarry, it is not possible that any one person should be heir of both their bodies: on the decease of the survivor, the law, therefore, in order to conform as nearly as possible to the manifest intent that the heir of the body of each of them should inherit, is obliged to sever the tenancy, and divide the inheritance between the heir of the body of A. and the heir of the body of B. Each heir will accordingly be entitled to a moiety of the rents and profits, as tenant in tail of such moiety. The heirs will now hold in a manner denominated tenancy in common: instead of both having the whole, each will have an undivided half. and no further right of survivorship will remain.

An estate in fee simple may also be given to two or more persons as joint tenants. The unity of this kind of tenure is remarkably shown by the words which are made use of to create a joint tenancy in fee simple. The lands intended to be given to joint tenants in fee simple are limited to them and their heirs, although the heirs of one of them only will succeed to the inheritance, provided the joint tenancy be allowed to continue: thus, if lauds

be given to A., B., and C., and their heirs, A., B., and C. will together be regarded as one person; and when they are all dead, but not before, the lands will descend to the heirs of the artificial person (so to speak) named in the gift. The survivor of the three, who together compose the tenant, will, after the decease of his companions, become entitled to the whole lands. While they all lived. each had the whole; when any die, the survivors or survivor can have no more. The heir of the survivor is, therefore, the person who alone will be entitled to inherit, to the entire exclusion of the heirs of those who may have previously died. A joint tenancy in fee simple is far more usual than a joint tenancy for life or in tail. Its principal use in practice is for the purpose of vesting estates in trustees, who are invariably made joint tenants. On the decease of one of them, the whole estate then vests at once in the survivors or survivor of them, without devolving on the heir at law of the deceased trustee, and without being affected by any disposition which he may have made by his will; for joint tenants are incapable of devising their respective shares by will: they are not regarded as having any separate interests, except as between or among themselves, while two or more of them are living.

The incidents of a joint tenancy, above referred to. last only so long as the joint tenancy exists. the power of any one of the joint tenants to sever the tenancy; for each joint tenant possesses an absolute power to dispose, in his lifetime, of his own share of the lands, by which means he destroys the joint tenancy. Thus, if there be three joint tenants of lands in fee simple, any one of them may, by any of the usual modes of alienation, dispose during his lifetime, though not by will, of an equal undivided third part of the whole inheritance. But should he die without having made such disposition, each one of the remaining two will have a similar right in his lifetime to dispose of an undivided moiety of the whole. From the moment of severance, the unity of interest and title is destroyed, and nothing is left but the unity of possession; the share which has been disposed of is at once discharged from the rights and incidents of joint tenancy, and becomes the subject of a tenancy in common. Thus, if there be three joint tenants, and any one of them should exercise his power of disposition in favor of a stranger, such stranger will then hold one undivided third part of the lands, as tenant in common with the remaining two.

Tenants in common are such as have a unity of possession but a distinct and several title to their shares. The shares in which tenants in common hold are by no means necessarily equal. Thus, one tenant in common may be entitled to one third or one fifth, or any other proportion of the profits of the land, and the other tenant or tenants in common to the residue. So, one tenant in common may have but a life or other limited interest in his share, another may be seised in fee of his, and the owners of another undivided share may be joint tenants as between themselves, while as to the other they are tenants in common. Between a joint tenancy and tenancy in common, the only similarity that exists is therefore the unity of possession. A tenant in common is, as to his own undivided share, precisely in the position of the owner of an entire and separate estate.

The enjoyment of lands in severalty is far more beneficial than either of the above modes. Accordingly it is in the power of any joint tenant or tenant in common to compel his companions to effect a partition between themselves, according to the value of their shares. In modern times, the Court of Chancery has been found to be the most convenient instrument for compelling the partition of estates, and by a modern statute, the old writ of partition, which had already become obsolete, was abolished. Whether the partition be effected through the agency of the Court of Chancery, or by the mere private agreement of the parties, mutual conveyances of their respective undivided shares must be made. in order to carry the partition into complete effect. With respect to joint tenants, these conveyances ought, as we have seen, to be in the form of releases; but tenants in common, having separate titles, must make mutual conveyances, as between strangers.

## CHAPTER VII.

### OF A FEOFFMENT.

By the act to simplify the transfer of property, it is provided that after the 31st day of January, 1844, every person may convey free-hold land by any deed without any of those other requisites, which, as we shall see, have hitherto been employed when an estate of free-hold has been conveyed. [Statutes having the same object in view are common in this country.] But, as the means hitherto necessary for the conveyance of freeholds depend on principles which still continue to exert their influence throughout the whole system of real property law, these means of conveyance and their principles must yet continue objects of the early attention of every student; of these means the most ancient is a feoffment with livery of section.

The feudal doctrine that all estates in land are holden of some lord, necessarily implies that all lands must always have some feudal holder or tenant. This feudal tenant is the freeholder, or holder of the freehold; he has the feudal possession, called the seisin, and so long as he is seised, nobody else can be. The freehold is said to be in him, and till it is taken out of him and given to some other, the land itself is regarded as in his custody or possession.

The transfer or delivery of the seisin, though it accompanies the transfer of the estate of the holder of the seisin, is yet not the same thing as the transfer of his estate. For a tenant merely for life is as much a feudal holder, and consequently as much in possession, or seised, of the freehold, as a tenant in fee simple can be. If, therefore, a person seised of an estate in free simple were to grant a lease to another for his life, the lessee must necessarily have the whole seisin given up to him, although he would not acquire the whole estate of his lessor. In ancient times, however, possession was the great point, and, until the recent act for simplifying the transfer of property, the conveyance of an estate of

freehold was of quite a distinct character from such assurances as were made use of when it was not intended to affect the freehold or feudal possession. For instance, we have seen that a tenant for a term of years is regarded in law as having merely a chattel interest; he has not the feudal possession or freehold in himself, but his possession, like that of a bailiff or servant, is the possession of his landlord. The consequence is, that any expressions in a deed, from which an intention can be gathered to grant the occupation of land for a certain time, have always been sufficient for a lease for a term of years however long; but a lease for a single life, which transfers the freehold, has hitherto required technical language to give it effect.

A feoffment with livery of seisin was then nothing more than a gift of an estate in the land with livery, that is, delivery of the seisin or feudal possession: this livery of seisin was said to be of two kinds, a livery in deed and a livery in law.

Livery in deed was performed "by delivery of the ring or haspe of the doore, or by a branch or twigge of a tree, or by a turfe of land, and with these or the like words, the feoffor and feoffee both holding the deed of feoffment and the ring of the doore, haspe, branch, twigge, or turfe, and the feoffor saying, 'Here I deliver you seisin and possession of this house, in the name of all the lands and tenements contained in this deed according to the forme and effect of this deed,' or by words without any ceremony or act, as, the feoffor being at the house doore, or within the house, 'Here I deliver you seisin and possession of this house, in the name of seisin and possession of all the lands and tenements contained in this deed." The feoffee then, if it were a house, entered alone, shut the door, then opened it, and let in the others. In performing this ceremony, it was requisite that all persons who had any estate or possession in the house or land, of which seisin was delivered, should either join in or consent to making the livery, or be absent from the premises; for the object was to give the entire and undisputed possession to the feoffee. If the feoffment was made of different lands lying scattered in one and the same county, livery of seisin of any parcel, in the name of the rest, was sufficient for all, if all were in the complete possession of the same feoffor; but if they

were in several counties there must have been as many liveries as there were counties. For if the title to these lands should come to be disputed, there must have been as many trials as there were counties; and the jury of one county are not considered judges of the notoriety of a fact in another.

Livery in law was not made on the land, but in sight of it only, the feoffor saying to the feoffee, "I give you yonder land, enter and take possession." If the feoffee entered accordingly in the lifetime of the feoffor, this was a good feoffment; but if either the feoffor or feoffee died before entry, the livery was void. This livery was good, although the land lay in another county; but it required always to be made between the parties themselves, and could not be deputed to an attorney, as might livery in deed. The word give was the apt and technical term to be employed in feoffment; its use arose in those times when gifts from feudal lords to their tenants were the conveyances principally employed. But now by the act to simplify the transfer of property livery of seisin is expressly dispensed with, and all technical terms of conveyance seem to have been rendered unnecessary. [So also in the United States.]

In addition to the livery of seisin, it was also necessary that the estate which the feoffee was to take should be marked out, whether for his own life or for that of another person, or in tail, or in fee simple, or otherwise. This marking out of the estate is as necessary now as formerly, and it is called limiting the estate. feudal holding is transferred, the estate must necessarily be an estate of freehold. Thus the land may be given to the feoffee to hold to himself simply: and the estate so limited is, as we have seen, but an estate for his life, and the feoffee is then generally called a lessee for his life; though when a mere life interest is intended to be limited, the land is usually expressly given to hold to the lessee "during the term of his natural life." If the land be given to the feoffee and the heirs of his body, he has an estate tail, and is called a donee in tail. And in order to confer an estate tail, it is necessary (except in a will, where greater indulgence is allowed) that words of procreation, such as heirs of his body, should be made use of; for a gift to a man and his heirs male is an estate in fee simple, and not in fee tail, there being no words of procreation to ascertain the body out of which they shall issue; and an estate in lands descendible to collateral male heirs only, in entire exclusion of females, is unknown to the English law. If the land be given to hold to the feoffee and his heirs, he has an estate in fee simple, the largest estate which the law allows. In every conveyance (except by will) of an estate of inheritance, whether in fee tail or in fee simple, the word heirs is necessary to be used as a word of limitation to mark out the estate. Thus, if a grant be made to a man and his seed, or to a man and his offspring, or to a man and the issue of his body, all these are insufficient to confer an estate tail, and only give an estate for life for want of the word heirs; so if a man purchase lands to have and to hold to him forever, or to him and his assigns forever, he will have but an estate for his life, and not a fee simple.

The formal delivery of the seisin or feudal possession, which always took place in a feoffment, rendered it, till recently, an assurance of great power; so that, if a person should have made a feoffment to another of an estate in fee simple, or of any other estate, not warranted by his own interest in the lands, such a feoffment would have operated by wrong, as it is said, and would have conferred on the feoffee the whole estate limited by the feoffment along with the seisin actually delivered; accordingly, such a feoffment by a tenant for life was regarded as a cause of forfeiture to the person entitled in reversion; such a feoffment being in fact a conveyance of his reversion, without his consent, to another person. [In the United States such a conveyance would, as a general rule, transfer only such interest as the grantor could lawfully convey, and would not, therefore, be a cause of forfeiture.]

Down to the time of King Henry VIII. nothing more was requisite to a valid feoffment than has been already mentioned. In the reign of this king, however, an act of parliament of great importance was passed, known by the name of the Statute of Uses (Stat. 27 Hen. VIII. c. 10). And since this statute, it has now become further requisite to a feoffment, either that there should be consideration for the gift, or that it should be expressed to be made, not simply unto, but unto and to the use of, the feoffee. The manner

in which this result has been brought about by the Statute of Uses will be explained in the next chapter.

If proper words of gift were used in the feoffment, and witnesses were present who could afterwards prove them, it mattered not, in ancient times, whether or not they were put into writing; though writing, from its greater certainty, was generally employed.

It very early became a rule of law that every writing under seal imported a consideration, — that is, that a step so solemn could not have been taken without some sufficient ground. This custom of sealing remained after the occasion for it had passed away, and writing had been generally introduced; so that, in all legal transactions, a seal was affixed to the written document, and the writing so sealed was, when delivered, called a deed. in Latin factum, a thing done; and, for a long time after writing had come into common use, a written instrument, if unsealed, had in law no superiority over mere words; nothing was in fact called a writing, but a document under seal; and at the present day a deed, or writing sealed and delivered, still imports a consideration, and maintains in many respects a superiority in law over a mere unsealed writing. In modern practice the kind of seal made use of is not regarded, and the mere placing of the finger on a seal already made is held to be equivalent to sealing; and the words "I deliver this as my act and deed," which are spoken at the same time, are held to be equivalent to delivery, even if the party keep the deed himself. [In most of the United States a scroll, written or printed, has been by statute made a valid seal.] The sealing and delivery of a deed are termed the execution of it.

Occasionally a deed is delivered to a third person not a party to it, to be delivered up to the other party or parties, upon the performance of a condition, as the payment of money or the like. It is then said to be delivered as an escrow or mere writing (scriptum); for it is not a perfect deed until delivered up on the performance of the condition; but when so delivered up, it operates from the time of its execution.

Any alteration or rasure in, or addition to a deed [if presenting no suspicious appearances] is presumed to have been made before its execution. And it was formerly

held that any alteration, rasure, or addition made in a material part of a deed after its execution by the grantor, even though made by a stranger, will render it void; and that any alteration in a deed made by the party to whom it was delivered, though in words not material, would also render it void. But a more reasonable doctrine has lately prevailed; and it has now been held that the filling in of the date of the deed, or of the names of the occupiers of the lands conveyed, or any such addition, if consistent with the purposes of the deed, will not render it void, even though done by the party to whom it had been delivered, after its execution.

If an estate has once been conveyed by a deed, of course the subsequent alteration, or even the destruction, of the deed cannot operate to reconvey the estate; and the deed, even though cancelled, may be given in evidence to show that the estate was conveyed by it whilst it was valid. But the deed having become void, no action could be brought upon any covenant contained in it.

Deeds have hitherto been divided into two kinds. Deeds poll and Indentures: a deed poll being made by one party only, and an indenture being made between two or more parties. Formerly, when deeds were more concise than at present, it was usual, where a deed was made between two parties, to write two copies upon the same piece of parchment, with some word or letters of the alphabet written between them, through which the parchment was cut, often in an indented line, so as to leave half the words on one part, and half on the other, thus serving the purpose of a tally. But at length indenting only came into use; and until recently every deed, to which there was more than one party, was cut with an indented or waving line at the top, and was called an indenture: and when a deed assumed the form of an indenture, every person who took any immediate benefit under it was always named as one of the parties. A deed made by only one party was polled or shaved even at the top, and was therefore called a deed poll; and, under such a deed, any person might accept a grant, though of course none but the party could make one. But now, by the act to simplify the transfer of property, it is enacted that it shall not be necessary in any case to be indented; and that any person, not being a party to any deed, may take an immediate benefit under it, in the same manner as he might under a deed poll. [The same rule prevails in the United States.] All deeds must be written either on paper or parchment.

Until the reign of King Charles II., the use of writing remained perfectly optional with the parties, in every case which did not require a deed under seal. In this reign, however, an act of parliament was passed (Stat. 29 Car. II. c. 3.) requiring the use of writing in many transactions which previously might have taken place by mere word of mouth. This act is intituled "An Act for Prevention of Frauds and Perjuries," and is now commonly called the Statute of Frauds. It enacts (Sect. 1). among other things, that all leases, estates, interests of freehold. or terms of years, or any uncertain interest, in messuages, manors, lands, tenements, or hereditaments, made or created by livery of seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and no greater force and effect; any consideration for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding. [Re-enacted in the United States with more or less modification. ] The only exception to this sweeping enactment is in favor of leases not exceeding three years from the making, and on which a rent of two-thirds at least of the full improved value is reserved to the landlord. consequence of this act, it became necessary that a feoffment should be put into writing, and signed by the party making the same, or his agent lawfully authorized by writing; but a deed or writing under seal does not appear to be essential, if livery of seisin be duly made.

Where a deed is made use of, it is a matter of doubt whether signing, as well as sealing, is absolutely necessary; previously to the Statute of Frauds, signing was not at all essential to a deed, provided it were only sealed and delivered; and the Statute of Frauds seems to be aimed at transactions by parol only, and not to be intended to affect deeds. Of this opinion is Mr. Preston. Sir William Blackstone, on the other hand, thinks signing now to be as necessary as sealing. And the Court of

Queen's Bench has, if possible, added to the doubt. However this may be, it would certainly be most unwise to raise the question by leaving any deed sealed and delivered, but not signed.

# CHAPTER VIII.

## OF USES AND TRUSTS.

Previously to the reign of Henry VIII.. when the Statute of Uses (27 Hen. VIII., c. 10) was passed, a simple gift of lands to a person and his heirs, accompanied by livery of seisin, was all that was necessary to convey to that person an estate in fee simple in the lands. The courts of law did not deem any consideration necessary; but if a man voluntarily gave lands to another, and put him in possession of them, they held the gift to be complete and irrevocable. In law, therefore, the person to whom a gift of lands was made, and seisin delivered, was considered thenceforth to be the true owner of the lands. equity, however, this was not always the case; for the Court of Chancery, administering equity, held that the mere delivery of the possession or seisin by one person to another was not at all conclusive of the right of the feoffee to enjoy the lands of which he was enfeoffed. Equity was unable to take from him the title which he possessed, and could always assert in the courts of law : but equity could and did compel him to make use of that legal title, for the benefit of any other person who might have a more righteous claim to the beneficial enjoyment. Thus if a feoffment was made of lands to one person for the benefit or to the use of another, such person was bound in conscience to hold the lands to the use or for the benefit of the other accordingly; so that while the title of the person enfeoffed was good in a court of law, yet he derived no benefit from the gift, for the Court of Chancery obliged him to hold entirely for the use of the other for whose benefit the gift was made. This device

was introduced into England about the close of the reign of Edward III. by the foreign ecclesiastics, who contrived by means of it to evade the statutes of mortmain, by which lands were prohibited from being given for religious purposes; for they obtained grants to persons to the use of the religious houses, which grants the clerical chancellors of those days held to be binding. process of time, such feoffments to one person to the use of another became very common; for the Court of Chancery allowed the "use" of lands to be disposed of in a variety of ways. among others by will, in which a disposition could not then be made of the lands themselves. Sometimes persons made feoffments of lands to others to the use of themselves the feoffors; and when a person made a feoffment to a stranger, without any consideration being given, and without any declaration being made for whose use the feoffment should be, it was considered in Chancery that it must have been meant by the feoffor to be for his own use. So that though the feoffee became in law absolutely seised of the lands, yet in equity he was held to be seised of them to the use of The Court of Chancery paid no regard to that implied consideration, which the law affixed to every deed on account of its solemnity, but looked only to what actually passed between the parties; so that a feoffment accompanied by a deed, if no consideration actually passed, was held to be made to the use of the feoffor, just as a feoffment by mere parol or word of mouth. If, however, there was any, even the smallest, consideration given by the feoffee, such as five shillings, the presumption that the feoffment was for the use of the feoffor was rebutted. and the feoffee was held entitled to his own use.

Transactions of this kind became in time so frequent that most of the lands in the kingdom were conveyed to uses, "to the utter subversion of the ancient common laws of this realm." The attention of the legislature was from time to time directed to the public inconvenience to which these uses gave rise; and after several attempts to amend them, an act of parliament was at last passed for their abolition. This act is no other than the Statute of Uses (27 Hen. VIII., c. 10), a statute which still remains in force, and exerts to the present day a most important influence over the conveyance of real property. [In

force to a greater or less extent by re-enactment in most of the United States.] By this statute, where any person or persons shall stand seised of any lands or other hereditaments to the use, confidence, or trust of any other person or persons, the persons that have any such use, confidence, or trust (that is, the persons beneficially entitled) shall be deemed in lawful seisin and possession of the same lands and hereditaments for such estates as they have in the use, trust, or confidence.

This statute was the means of effecting a complete revolution in the system of conveyancing. Suppose a feoffment be now made to A. and his heirs, and the seisin duly delivered to him; if the feoffment be expressed to be made to him and his heirs to the use of some other person, as B. and his heirs, A. (who would, before this statute, have had an estate in fee simple at law) now takes no permanent estate, but is made by the statute to be merely a kind of conduit pipe for conveying the estate to B. For B. (who before would have had only a use or trust in equity) shall now, having the use, be deemed in lawful seisin and possession; in other words, B. now takes, not only the beneficial interest, but also the estate in fee simple at law, which is wrested from A. by force of the statute.

Again, suppose a feoffment to be now made simply to A. and his heirs without any consideration. We have seen that before the statute the feoffor would in this case have been held in equity to have the use, for want of any consideration to pass it to the feoffee; now, therefore, the feoffor, having the use, shall be deemed in lawful seisin and possession; and consequently, by such a feoffment, although livery of seisin be duly made to A., yet no permanent estate will pass to him; for the moment he obtains the estate he hold's it to the use of the feoffor; and the same instant comes the statute, and gives to the feoffer, who has the use, the seisin and possession. The feoffor, therefore, instantly gets back all that he gave; and the use is said to result to himself. If. however, the feoffment be made unto and to the use of A. and his heirs - as, before the statute, A. would have been entitled for his own use, so now he shall be deemed in lawful seisin and possession, and an estate in fee simple will effectually pass to him accordingly. The propriety of inserting, in every feoffment, the words, to the use of, as well as to the feoffee, is therefore manifest. It appears also that an estate in fee simple may be effectually conveyed to a person by making a feoffment to any other person and his heirs, to the use of or upon confidence or trust for such former person and his heirs. Thus, if a feoffment be made to A. and his heirs, to the use of B. and his heirs, an estate in fee simple will now pass to B. as effectually as if the feoffment had been made directly unto and to the use of B. and his heirs in the first instance. The words "to the use of" are now almost universally employed for such a purpose; but "upon confidence," or "upon trust for," would answer as well, since all these expressions are mentioned in the statute.

The word "trust," however, is never employed in modern conveyancing when it is intended to vest an estate in fee simple in any person by force of the Statute of Uses. Such an intention is always carried into effect by the employment of the word use, and the word trust is reserved to signify a holding by one person for the benefit of another similar to that which, before the statute, was called a use.

The Statute of Uses was evidently intended to abolish altogether the jurisdiction of the Court of Chancery over landed estates, by giving actual possession at law to every person beneficially entitled in equity. But this object has not been accomplished: for the Court of Chancery soon regained in a curious manner its former ascendancy, and has kept it to the present day. So that all that was ultimately effected by the Statute of Uses was to import into the rules of law some of the then existing doctrines of the Courts of Equity, and to add three words, to the use, to every conveyance.

The manner in which the Court of Chancery regained its ascendancy was as follows: Soon after the passing of the Statute of Uses, a doctrine was laid down that there could not be a use upon a use. For instance, suppose a feofiment had been made to A. and his heirs, to the use of B. and his heirs, to the use of C. and his heirs; the doctrine was that the use to C. and his heirs was a use upon a use, and was therefore not affected by the Statute of Uses, which could only execute or operate on the use to

B. and his heirs. So that B. and not C. became entitled, under such a feoffment, to an estate in fee simple in the lands comprised in the feoffment. Even if the first use be to the feoffee himself. that use only will be executed, and he will take the fee simple; thus under a feoffment unto and to the use of A. and his heirs, to the use of C. and his heirs, C. takes no estate in law, for the use to him is a use upon a use; but the fee simple vests in A., to whom the use is first declared. Here then was at once an opportunity for the Court of Chancery to interfere. It was manifestly inequitable that C., the party to whom the use was last declared, should be deprived of the estate, which was intended solely for his benefit: the Court of Chancery, therefore, interposed on his behalf, and constrained the party, to whom the law had given the estate, to hold in trust for him to whom the use was last declared. Thus arose the modern doctrine of uses and trusts. And hence it is that if it is now wished to vest a freehold estate in one person as trustee. for another, the conveyance is made unto the trustee, or some other person (it is immaterial which), and his heirs, to the use of the trustee and his heirs, in trust for the party intended to be benefited (called cestui que trust) and his heirs. An estate in fee simple is thus vested in the trustee, by force of the Statute of Uses, and the entire beneficial interest is given over to the cestui que trust by the Court of Chancery. The estate in fee simple, which is vested in the trustee, is called the legal estate, being an estate to which the trustee was entitled only in the contemplation of a court of law, as distinguished from equity. The interest of the cestui que trust is called an equitable estate, being an estate to which he was entitled only in the contemplation of the Court of Chancery, which administered equity. In the present instance, the equitable estate being limited to the cestui que trust and his heirs, he has an equitable estate in fee simple. He is the beneficial owner of the property. The trustee, by virtue of his legal estate, has the right and power to receive the rents and profits: but the cestui que trust is able, by virtue of his estate in equity, at any time to oblige his trustee to come to an account, and hand over the whole of the proceeds.

We have now arrived at a very prevalent and important kind

of interest in landed property, namely, an estate in equity merely, and not at law. The owner of such an estate had no title at all in any court of law, but must have recourse exclusively to the Court of Chancery, where he will find himself considered as owner, according to the equitable estate he may have.

In the construction and regulation of trusts, equity is said to follow the law, that is, the Court of Chancery generally adopted the rules of law applicable to legal estates; thus, a trust for A. for his life, or for him and the heirs of his body, or for him and his heirs, will give him an equitable estate for life, in tail, or in fee simple. An equitable estate tail may also be barred, in the same manner as an estate tail at law, and cannot be disposed of by any other means. But equitable estates in tail, or in fee simple, may be conferred without the use of the words heirs of the body, or heirs, if the intention be clear; for, equity pre-eminently regards the intention and agreements of parties.

An equitable estate in fee will not escheat to the lord upon corruption of the blood or failure of heirs of the cestui que trust, for a trust is a mere creature of equity, and not a subject of tenure; in such a case, therefore, the trustee will hold the lands discharged from the trust which has so failed; and he will accordingly have a right to receive the rents and profits without being called to account by any one.

But the descent of an equitable estate on intestacy follows the rules of the descent of legal estates; and, therefore, in the case of gavelkind and borough-English lands, trusts affecting them will descend according to the descendible quality of the tenure.

Trusts or equitable estates may be created and passed from one person to another, without the use of any particular ceremony or form of words.

But by the Statute of Frauds, Sect. 4, it is enacted that no action shall be brought upon any agreement made upon consideration of marriage, or upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the

party to be charged therewith, or some other person thereunto by him lawfully authorized. It is also enacted that all declarations or creations of trusts or confidences of any lands, tenements, or here-ditaments, shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing; and further, that all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, or by his last will. Trusts arising or resulting from any conveyance of lands or tenements, by implication or construction of law, and trusts transferred or extinguished by an act or operation of law, are exempt from this statute.

In the transfer of equitable estates it is usual, in practice, to adopt conveyances applicable to the legal estate; but this is never necessary. If writing is used, and duly signed, in order to satisfy the Statute of Frauds, and the intention to transfer is clear, any words will answer the purpose.

Trust estates, besides being subject to voluntary alienation, are also liable, like estates at law, to involuntary alienation for the payment of the owner's debts. By the Statute of Frauds it was provided, that if any cestui que trust should die, leaving a trust in fee simple to descend to his heir, such trust should be assets by descent, and the heir should be chargeable with the obligation of his ancestors for and by reason of such assets, as fully as he might have been if the estate in law had descended to him in possession in like manner as the trust descended.

The same Statute of Frauds also gave a remedy to the creditor who had obtained a judgment against his debtor, by providing that it should be lawful for every sheriff or other officer to whom any writ should be directed, upon any judgment, to deliver execution unto the party in that behalf suing of all such lands and hereditaments as any other person or persons should be seised or possessed of in trust for him against whom execution was sued, like as the sheriff or other officer might have done if the party against whom execution should be sued had been seised of such lands or hereditaments of such estate as they be seised of in trust for him at the time of execution sued.

Every purchaser of landed property has a right to a good title both at law and in equity; and if the legal estate should be vested in a trustee, or any person other than the vendor, the concurrence of such trustee or other person must be obtained for the purpose of vesting the legal estate in the purchaser, or, if he should please, in a new trustee of his own choosing. When a person has an estate at law, and does not hold it subject to any trust, he has of course the same estate in equity, but without any occasion for resorting to its aid. To him, therefore, the doctrine of trusts does not apply: his legal title is sufficient; the law declares the nature and incidents of his estate, and equity has no ground for interference.

### CHAPTER IX.

## OF A MODERN CONVEYANCE.

In modern times, down to the year 1841, the kind of conveyance employed, on every ordinary purchase of a freehold estate, was called a lease and release; and for every such transaction two deeds were always required. [The law of conveyancing in England and the United States has been variously regulated by statute. Livery of seisin has been rendered unnecessary, and conveyances much simplified. The student should at this point consult the statutes of the State in which he proposes to practise. For an account of the older methods of conveying real property at the common law and under the Statute of Uses, see Vol. I., Essentials, p. 221 et seq. It has not been thought expedient to repeat here what will there be found.]

### CHAPTER X.

#### OF A WILL OF LANDS.

The right of testamentary alienation of lands is a matter depending upon act of Parliament. Previously to the reign of Henry VIII. an estate in fee simple, if not disposed of

in the lifetime of the owner, descended, on his death, to his heir at To this rule, gavelkind lands, and lands in a few favored boroughs formed exceptions: and the hardship of the rule was latterly somewhat mitigated by the prevalence of conveyances to uses: for the Court of Chancerv allowed the use to be devised by But when the Statute of Uses came into operation, and all uses were turned into legal estates, the title of the heir again prevailed, and the inconvenience of the want of testamentary power then began to be felt. To remedy this inconvenience an act of Parliament (32 Hen. VIII., c. 1, explained by statute 34 & 35 Hen. VIII., c. 5), was passed six years after the enactment of the Statute of Uses. By this act, every person having any lands or hereditaments holden in socage, or in the nature of socage tenure, was enabled, by his last will and testament in writing, to give and devise the same at his will and pleasure; and those who had estates in fee simple in lands held by knight's service were enabled, in the same way, to give and devise two-third parts thereof. When, by the statute of 12 Car. II., c. 24, socage was made the universal tenure, all estates in fee simple became at once devisable, being all then holden by socage. extensive power of devising lands by a mere writing unattested was soon curtailed by the Statute of Frauds (29 Car. II., c. 3, s. 5), which required that all devises and bequests of any lands or tenements, devisable either by statute or the custom of Kent, or of any borough, or any other custom, should be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express directions, and should be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they should be utterly void and of none effect. This statute . has been re-enacted, with more or less change as to the manner of execution, number of witnesses, etc., in all of the United States, The student should here consult the statute of his State.]

The Statute of Frauds, it will be observed, required that the witnesses should be credible; and on the point of credibility, the rules of law with respect to witnesses have, till recently, been so strict, that it would not even listen to any witness

who had the smallest pecuniary interest in the result of his own testimony. Hence, under the Statute of Frauds, a bequest to a witness to a will, or to the wife or husband of a witness, prevented such witness from being heard in support of the will; and, the witness being thus incredible, the will was void for want of three credible witnesses. By an act of George II. (Stat. 25 Geo. II., c. 6), a witness to whom a gift was made was rendered credible, and the gift only which was made to the witness was declared void. [See Rev. Stat. III., c. 148, s. 8. Statutes, more or less similar, exist in other States.]

A will does not take effect until the decease of the testator. In the mean time, it may be revoked in various ways; as by the marriage of either a man or woman (Stat. 7 Will. IV. & 1 Vict., c. 26, s. 18; Rev. Stat. Ill., c. 39, s. 10), though, before the Wills Act, the marriage of a man was not sufficient to revoke his will, unless he also had a child born. A will may also be revoked by burning, tearing, or otherwise destroying the same, by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

A will may also be revoked by any writing, executed in the same manner as a will, and declaring an intention to revoke, or by a subsequent will or codicil, to be executed as before. And where a codicil is added, it is considered as part of the will; and the disposition made by the will is not disturbed further than is absolutely necessary to give effect to the codicil.

The above are the only means by which a will can be revoked; unless, of course, the testator choose afterwards to part with any of the property comprised in his will, which he is at perfect liberty to do. In this case the will is revoked as to the property parted with. Under the statute of Henry VIII. a will of lands was regarded in the light of a present conveyance, to come into operation at a future time, namely, on the death of the testator. And if a man, having made a will of his lands, afterwards disposed of them, they would not, on returning to his possession, again become subject to his will, without a subsequent republication or revival of the will. In the same manner, the old statute was not considered as enabling a person to dispose by will of any lands, except such as he was possessed of at the time of making his will; so that lands

purchased after the date of the will could not be affected by any of its dispositions, but descended to the heir at law. This is altered by the Wills Act [and also by statute in the United States], which enacts that every will shall be construed, with reference to the property comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will. So that every man may now dispose, by his will, of all such landed property, or real estate, as he may hereafter possess, as well as that which he now has.

The failure of a devise, by the decease of the devisee in the testator's lifetime, is called a lapse; and this lapse is not prevented by the lands being given to the devisee and his heirs; and in the same way, before the Wills Act, a gift to the devisee and the heirs of his body would not carry the lands to the heir of the body of the devisee, in case of the devisee's decease in the lifetime of the testator. For the terms "heirs" and "heirs of the body" are words of limitation merely; that is, they merely mark out the estate which the devisee, if living at the testator's death, would have taken, — in the one case an estate in fee simple, in the other an estate tail; and the heirs are no objects of the testator's bounty, further than as connected with their ancestor.

The construction of wills. In construing wills, the courts have always borne in mind that a testator may not have had the same opportunity of legal advice in drawing his will as he would have had in executing a deed. And the first great maxim of construction accordingly is, that the intention of the testator ought to be observed.

It is now provided by statute both in England and most of the United States that where any real estate shall be devised to any person, without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest, which the testator had power to dispose of by will, in such real estate, unless a contrary intention shall appear by the will.

It is a general principle in the construction of wills that any kind of estates may be given by will, whenever an intention so to do is expressed or clearly implied. In a deed, technical words are always required; to create an estate tail

by a deed, it is necessary that the word heirs, coupled with words of procreation, such as heirs of the body, should be made use of. So, to give an estate in fee simple, it is necessary, in a deed, to use the word heirs as a word of limitation to limit or mark out the But in a will, a devise to a person and his seed, or to him and his issue, and many other expressions, are sufficient to confer an estate tail; and a devise to a man and his heirs male, which, in a deed, would be held to confer a fee simple, in a will gives an estate in tail male; for the addition of the word "male," as a qualification of heirs, shows that a class of heirs, less extensive than heirs general. was intended: and the gift of an estate in tail male, to which, in a will, words of procreation are unnecessary, is the only gift which at all accords with such an intention. So, even before the enactment. directing that a devise without words of limitation should be construed to pass a fee simple, an estate in fee simple was often held to be conferred without the use of the word heirs. Thus, such an estate was given by a devise to one in fee simple, or to him forever, or to him and his assigns forever, or by a devise of all the testator's estate, or of all his property, or all his inheritance, and by a vast number of other expressions, by which an intention to give the fee simple could be considered as expressed or implied.

The doctrine of uses and trusts applies as well to a will as to a conveyance made between living parties. Thus, a devise of lands to A. and his heirs, to the use of B. and his heirs, upon certain trusts to be performed by B., will vest the legal estate in fee simple in B.; and the Court of Chancery will compel him to execute the trust; unless, indeed, he disclaim the estate, which he is at perfect liberty to do. But if any trust or duty shall be imposed upon A., it will then become a question, on the construction of the will, whether or not A. takes any legal estate; and, if any, to what extent. If no trust or duty is imposed on him, he is a mere conduit-pipe for conveying the legal estate to B., filling the same passive office as a person to whom a feoffment or conveyance has been made to the use of another. In doubtful cases, the leaning of the courts has been to give to the trustees no greater estate than was absolutely necessary for the purposes of their trust.

## CHAPTER XI.

# OF THE MUTUAL RIGHTS OF HUSBAND AND WIFE.1

1. First, as to the rights of the husband in respect of the lands of his wife.

By the act of marriage, the husband and wife become in law one person, and so continue during the coverture or marriage. The wife is as it were merged in her husband. Accordingly, the husband is entitled to the whole of the rents and profits which may arise from his wife's lands, during the continuance of the coverture; and, in like manner, all the goods and personal chattels of the wife, the property in which passes by mere delivery of possession, belong solely to her husband.

In modern times, however, a more liberal doctrine has been established by the Court of Chancery; for this court now permits property of every kind to be vested in trustees, in trust for the sole and separate use of a woman during any coverture, present or future. Trusts of this nature are continually enforced by the court; that is, the court will oblige the trustees to hold for the sole benefit of the wife, and will prevent the husband from interfering with her in the disposal of such property; she will consequently enjoy the same absolute power of disposition over it as if she were sole or unmarried. And, if property should be given or conveyed directly to a woman, for her separate use, without the intervention of any trustee, the court will compel her husband himself to hold his marital rights in the property simply as a trustee for his wife, independently of himself. The limitation of property in trust for the separate use of an intended wife is one of the principal objects of a modern marriage settlement. By means of such a

¹ The common law rules upon the subject of this chapter have been greatly changed in the United States by statute. A knowledge of the common law upon the subject is, however, still necessary in construing and determining the effect of these statutes.

trust, a provision may be secured, which shall be independent of the debts and liabilities of the husband, and thus free from the risk of loss, either by reason of his commercial embarrassments or of his extravagant expenditure.

Not only the income, but also the corpus of any property, whether real or personal, may be limited to the separate use of a married woman. Recent decisions have established that a simple gift of real estate, either with or without the intervention of trustees, for the separate use of a married woman, is sufficient to give her in equity a power to dispose of it by deed or will, without the consent or concurrence of her husband. The same rule has long been established with respect to personal estate.

Whilst provisions for the separate benefit of a married woman have thus arisen in equity, the rule of law by which husband and wife are considered as one person still continues in operation, and is occasionally productive of rather curious consequences. Thus, if lands be given to A. and B. (husband and wife), and C., a third person, and their heirs. - here, had A. and B. been distinct persons, each of the three joint tenants would have been entitled, as between themselves, to one third part of the rents and profits, and would have had a power of disposition also over one third part of the whole inheritance. But, since A. and B., being husband and wife, are only one person, they will take, under such a gift, a moiety only of the rents and profits, with a power to dispose only of one half of the inheritance; and C., the third person, will take the other half, as joint tenant with them. Again, if lands be given to A. and B. (husband and wife) and their heirs, - here, had they been separate persons, they would have become, under the gift, joint tenants in fee simple, and each would have been enabled, without the consent of the other, to dispose of an undivided moiety of the inheritance. But, as A. and B. are one, they now take, as it is said, by entireties; and, whilst the husband may do what he pleases with the rents and profits during the coverture, he cannot dispose of any part of the inheritance without his wife's concurrence. Unless they both agree in making a disposition, each one of them must run the risk of gaining the whole by survivorship, or losing it by dying first.

Another consequence of the unity of husband and wife is the inability of either of them to convey to the other. [Changed by statute in some of the United States.] As a man cannot convey to himself, so he cannot convey to his wife, who is part of himself. But a man may leave lands to his wife by his will; for the married state does not deprive the husband of that disposing power which he would possess if single, and a devise by will does not take effect until after his decease. And by means of the Statute of Uses, the effect of a conveyance by a man to his wife can be produced; for a man may convey to another person to the use of his wife, in the same manner as, under the statute, we have seen, a man may convey to the use of himself.

If the wife should survive her husband, her estates in fee simple will remain to herself and her heirs, after his death, unaffected by any debts which he may have incurred, or by any alienation which he may have attempted to make If, however, the husband should survive his wife, he will, in case he has had issue by her born alive, that may by possibility inherit the estate as her heir, become entitled to an estate for the residue of his life in such lands and tenements of his wife as she was solely seised of in fee simple, or fee tail in possession. The husband, while in the enjoyment of this estate, is called a tenant by the curtesy of England, or, more shortly, tenant by the curtesy. [Abolished by statute in some of the States.] If the wife's estate should be equitable only, that is, if the lands should be vested in trustees for her and her heirs, her husband will still, on surviving, in case he has had issue which might inherit. be entitled to be tenant by the curtesy, in the same manner as if the estate were legal; for equity in this respect follows the law.

Hitherto we have seen the extent of the husband's interest, and power of disposition, apart from his wife. If land should be settled in trust for the separate use of the wife, with a clause restraining alienation, neither husband nor wife can make any disposition. But, in all other cases, the husband and wife may together make any such disposition of the wife's interest in real estate as she could do if unmarried. The mode in which such dispositions were formerly effected was by a fine duly levied in the Court of Common Pleas. [In the United States a.

married woman may generally convey her land by joining with her husband in a deed of conveyance of the same, and acknowledging the same in the manner prescribed by statute.] Whenever a married woman was party to a fine, it was necessary that she should be examined apart from her husband, to ascertain whether she joined in the fine of her own free will, or was compelled to it by the threats and menaces of her husband. Having this protection, a fine by husband and wife was an effectual conveyance, as well of the wife's as of the husband's interest of every kind, in the land comprised in the fine. But, without a fine, no conveyance could be made of the wife's lands; thus, she could not leave them by her will, even to her husband; although, by means of the Statute of Uses, a testamentary appointment of lands, in the nature of a will, might be made by the wife in favor of her husband, in a manner to be hereafter explained.

2. As to the rights of the wife in the lands of her husband. If at any time during the coverture the husband became solely seised of any estate of inheritance, that is fee simple or fee tail, in lands to which any issue which the wife might have had might by possibility have been heir, she from that time became entitled, on his decease, to have one equal third part of the same lands allotted to her, to be enjoyed (by her in severalty) during the remainder of her life. This right, having once attached to the lands, adhered to them, notwithstanding any sale or devise which the husband might make. It consequently became necessary for the husband, whenever he wished to make a valid conveyance of his lands, to obtain the concurrence of his wife, for the purpose of releasing her right to dower. This release could be effected only by means of a fine, [now by joining with her husband in a conveyance, I in which the wife was separately examined.

As the right to dower was paramount to the alienation of the husband, so it was quite independent of his debts, — even of those owing to the Crown. It was necessary, however, that the husband hould be seised of an estate of inheritance at law; for the Court of Chancery, whilst it allowed to husbands curtesy of their wives' equitable estates, withheld from wives a like privilege of dower out of the equitable estates of their husbands. The estate, moreover,

must have been held in severalty or in common, and not in joint tenancy. The estate was also required to be an estate of inheritance in possession; although a seisin in law, obtained by the husband, was sufficient to cause his wife's right of dower to attach. In no case, also, was any issue required to be actually born; it was sufficient that the wife might have had issue who might have inherited.

The right of dower might have been barred altogether by a jointure, agreed to be accepted by the intended wife previously to marriage, in lieu of dower. This jointure was either legal or equitable. A legal jointure was first authorized by the Statute of Uses, which, by turning uses into legal estates, of course rendered them liable to dower. Under the provisions of this statute, dower may be barred by the wife's acceptance previously to marriage, and in satisfaction of her dower, of a competent livelihood of freehold lands and tenements, to take effect in profit or possession presently after the death of the husband for the life of the wife at least. [Similar statutes exist in the United States.] If the jointure be made after marriage, the wife may elect between her dower and her jointure. A legal jointure, however, has in modern times seldom been resorted to as a method of barring dower; when any jointure has been made, it has usually been merely of an equitable kind : for if the intended wife be of age, and a party to the settlement, she is competent in equity to extinguish her title to dower upon any terms to which she may think proper to agree. And if the wife should have accepted an equitable jointure, the Court of Chancery will effectually restrain her from setting up any claim to her dower. But in equity, as well as at law, the jointure, in order to an absolute bar of dower, must be made before marriage.

# PART II.

## OF INCORPOREAL HEREDITAMENTS.

BESIDES corporeal property, there exists also another kind of property, which, not being of a visible and tangible nature, is denominated incorporeal. This kind of property, though it may accompany that which is corporeal, yet does not in itself admit of actual delivery. When, therefore, it was required to be transferred as a separate subject of property, it was always conveyed, in ancient times, by writing, that is, by deed; for formerly all legal writings were in fact deeds. Property of an incorporeal kind was, therefore, said to lie in grant, whilst corporeal property was said to lie in livery. For the word grant, though it comprehends all kinds of conveyances, yet more strictly and properly taken is a conveyance by deed only. In this difference in the ancient mode of transfer accordingly lies the chief distinction between these two classes of property.

But there is another division of property, namely, that of real and personal; and it is evident that property of a personal kind may be incorporeal in its nature as well as that which is real, and which falls within the title of hereditaments. Incorporeal property of a personal kind does not, however, necessarily require a deed for the purpose of transferring it as an independent subject of possession.

## CHAPTER I.

#### OF A REVERSION AND A VESTED REMAINDER.

If a tenant in fee simple should grant to another person a lease for a term of years, or for life, or even if he should grant an estate tail, it is evident that he will not thereby dispose of all his interest; for in each case his grantee has a less estate than himself. Accordingly, on the expiration of the term of years, or on the decease of the tenant for life, or on the decease of the donee in tail without having barred his estate tail and without issue, the remaining interest of the tenant in fee will revert to himself or his heirs, and he or his heir will again become tenant in fee simple in possession. The smaller estate which he has so granted is called, during its continuance, the particular estate, being only a part, or particula, of the estate in fee. And during the continuance of such particular estate, the interest of the tenant in fee simple, which still remains undisposed of, — that is, his present estate, in virtue of which he is to have again the possession at some future time, — is called his reversion.

If at the same time with the grant of the particular estate he should also dispose of this remaining interest or reversion, or any part thereof, to some other person, it then changes its name, and is termed, not a reversion, but a remainder. Thus, if a grant be made by A., a tenant in fee simple, to B. for life, and after his decease to C. and his heirs, the whole fee simple of A. will be disposed of, and C.'s interest will be termed a remainder, expectant on the decease of B. A remainder, therefore, always has its origin in express grant; a reversion merely arises incidentally, in consequence of the grant of the particular estate. It is created simply by the law, whilst a remainder springs from the act of the parties.

1. And, first, of a reversion. If the tenant in fee simple should have made a lease merely for a term of years, his reversion is looked on, in law, precisely as a continuance of his old estate, with respect to himself and his heirs, and to all other persons but the tenant for years. The owner of the fee simple is regarded as having simply placed a bailiff on his property; and the consequence is, that, subject to the lease, the owner's rights of alienation remain unimpaired, and may be exercised in the same manner as before. The feudal possession or seism has not been parted with. And a conveyance of the reversion may, therefore, be made by a feofiment, with livery of seism made with the consent of the tenant for years. But, if

this mode of transfer should not be thought eligible, a grant by deed will be equally efficacious. For the estate of the grantor is strictly incorporeal, the tenant for years having the actual possession of the lands.

But, if the tenant in fee simple should have made a lease for life, he must have parted with his seisin to the tenant for life; for an estate for life is an estate of freehold, and such tenant for life will, therefore, during his life, continue to be the freeholder, or holder of the feudal seisin. No feofiment can consequently be made by the tenant in fee simple; for he has no seisin of which to make livery. His reversion is but a fragment of his old estate, and remains purely incorporeal, until, by the dropping of the life of the grantee, it shall again become an estate in possession. Till then, that is, so long as it remains a reversion expectant on an estate of freehold, it can only be conveyed, like all other incorporeal hereditaments, when apart from what is corporeal, by a deed of grant.

In the case of a lease for life or years, a tenure is created between the parties, the lessee becoming tenant to the To this tenure are usually incident two things, fealty and The oath of fealty is now never exacted; but the rent. which may be reserved, is of practical importance. This rent is called in law rent service, in order to distinguish it from other kinds of rent, to be spoken of hereafter, which have nothing to do with the services anciently rendered by a tenant to his lord. It consists usually, but not necessarily, of money; for, it may be rendered in corn, or in anything else. To the reservation of a rent service. a deed has hitherto been not absolutely necessary. For although the rent is an incorporeal hereditament, yet the law considered that the same ceremony, by which the nature and duration of the estate were fixed and evidenced, was sufficient also to ascertain the rent to be paid for it. But, according to the exception in the Statute of Frauds, where the lease does not exceed three years from the making. rent of two thirds of the full improved value, or more, may be eserved by parol merely.

Rent service, when created, is considered to be issuing out of every part of the land in respect of which it is paid: one part of the land is as much subject to it as another. For the

recovery of rent service, the well-known remedy is by distress of the goods of the tenant found on any part of the premises. This remedy for the recovery of rent service belongs to the landlord of common right, without any express agreement. In modern times it has been extended and facilitated by various statutes.

In addition to the remedy by distress, there is usually contained in leases a condition of re-entry, empowering the landlord, in default of payment of the rent for a certain time, to re-enter on the premises and hold them as of his former estate. When such a condition is inserted, the estate of the tenant, whether for life or years, becomes determinable on such re-entry. Before any entry can be made under a proviso or condition for re-entry on non-payment of rent, the landlord is required to make a demand, upon the premises, of the precise rent due, at a convenient time before sunset of the last day when the rent could be paid according to the condition; thus, if the proviso were for re-entry on non-payment of the rent by the space of thirty days, the demand must have been made on the evening of the thirtieth day.

In ancient times, the benefit of a condition of re-entry could belong only to the landlord and his heirs: for the law would not allow of the transfer of a mere conditional right to put an end to the estate of another. A right of re-entry was considered in the same light as a right to bring an action for money due; which right was not assignable. This doctrine sometimes occasioned considerable inconvenience; and in the reign of Henry VIII, it was found to press hardly on the grantees from the Crown of the lands of the dissolved monasteries. A statute was accordingly passed (32 Hen. VIII., c. 34), which enacts that as well the grantees of the Crown as all other persons being grantees or assignees, their heirs, executors, successors, and assigns, shall have the like advantages against the lessees, by entry for non-payment of rent, or for doing of waste, or other forfeiture, as the lessors or grantors themselves, or their heirs or successors, might at any time have had or enjoyed; and this statute is still in force. There exist also further means for the recovery of rent, in certain actions at law, which the landlord may bring against his tenant for obtaining payment.

Rent service, being incident to the reversion, passes by a grant of such reversion without the necessity of any express mention of the rent. Formerly no grant could be made of any reversion without the consent of the tenant, expressed by what was called his attornment to his new landlord. It was thought reasonable that a tenant should not have a new landlord imposed upon him without his consent. The landlord, however, had it always in his power to convey his reversion by the expensive process of a fine duly levied in the Court of Common Pleas, and the attornment of the tenant, which for many purposes was desirable, could in such case be compelled. This doctrine being found inconvenient when the rent paid by the tenant became the only service of any benefit rendered to the landlord, the necessity of attornment to the validity of the grant of a reversion was abolished by a statute (4 & 5 Anne, c. 3, c. 16 in Ruffhead, s. 9). But the statute properly provides that no tenant shall be prejudiced or damaged by payment of his rent to the grantor, or by breach of any condition for nonpayment of rent. before notice of the grant shall be given to him by the grantee. [Similar statutes exist in the United States.]

Nothing, therefore, is now necessary for the valid conveyance of any rent service, but a grant by deed of the reversion, to which such rent is incident. In such a conveyance the word grant is usually employed as the proper operative word, but its employment is not absolutely necessary; any other words indicative of the intention will answer the purpose. When the conveyance is made to the tenant himself, it is called a release.

2. A remainder chiefly differs from a reversion in this,—that between the owner of the particular estate and the owner of the remainder (called the remainder-man) no tenure exists. They both derive their estates from the same source, the grant of the owner in fee simple; and one of them has no more right to be lord than the other. But as all estates must be holden of some person, in the case of a grant of a particular estate with a remainder in fee simple, the particular tenant and the remainder-man both hold their estates of the same chief lord as their grantor held before. It consequently follows that no rent service is incident to a remainder, as it usually is to a reversion;

for rent service is an incident of tenure, and in this case no tenure exists. The other point of difference between a reversion and a remainder is, that a reversion arises necessarily from the grant of the particular estate, being simply that part of the estate of the grantor which remains undisposed of, but a remainder is always itself created by an express grant.

The powers of alienation possessed by a tenant in fee simple enable him to make a lease for a term of years. or for life, or a gift in tail, as well as to grant an estate in fee simple. But these powers are not simply in the alternative, for he may exercise all these powers of alienation at one and the same moment; provided, of course. that his grantees come in one at a time, in some prescribed order, the one waiting for liberty to enter until the estate of the other is determined. In such a case the ordinary mode of conveyance is alone made use of; and if a feoffment should be employed, there will be no occasion for a deed to limit or mark out the estates of those who cannot have immediate possession. The seisin will then be delivered to the first person who is to have possession; and if such person is to be only a tenant for a term of years, such seisin will immediately vest in the prescribed owner of the first estate of freehold, whose bailiff the tenant for years is accounted to be. From such first freeholder, on the determination of his estate, the seisin will devolve on the other grantees of freehold estates in the order in which their estates are limited to come into So long as a regular order is thus laid down, in which the possession of the lands may devolve, it matters not how many kinds of estates are granted, or on how many persons the same estate is bestowed. Thus a grant may be made of a term of years to one person, an estate for life to another, an estate in tail to a third, and last of all an estate in fee simple to a fourth: and these grantees may be entitled to possession in any prescribed order. except as to the grantee of the estate in fee simple, who must necessarily come last. When a remainder comes after an estate tail, it is liable to be barred by the tenant in tail. But, if any estate, be it ever so small, is always ready, from its commencement to its end, to come into possession the moment the prior estates, be they what they may, happen to determine, it is then a vested remainder, and recognized in law as an estate grantable by deed.

The limitation of a remainder in tail or in fee simple to a person who has already an estate of freehold, as for life, is governed by a rule of law, known by the name of the rule in Shelley's Case, — so called from a celebrated case in Lord Coke's time, in which the subject was much discussed (Shelley's Case, 1 Rep. 94, 104), although the rule itself is of very ancient date.

This rule is as follows: When the ancestor, by any gift or conveyance, takes an estate of freehold, and, in the same gift or conveyance, an estate is limited, either mediately or immediately, to his heirs in fee or in tail, the word "heirs" is a word of limitation of the estate of the ancestor, and not a word of purchase. The heir, if he should take any interest, must take as heir by descent from his ancestor; for he is not constituted, by the words of the gift or conveyance, a purchaser of any separate and independent estate for himself. [This rule prevails in most of the United States except where repealed by statute.]

The rule requires that an estate of freehold merely should be taken by the ancestor, and not necessarily an estate for his own life or in tail. The ancestor himself, as well as his heirs, may be deprived of possession for a time; and yet an estate in fee simple or fee tail may be effectually vested in the ancestor, subject to such deprivation. For instance, suppose lands to be given to A., a widow, during her life, provided she continue a widow and unmarried, and after her marriage, to B. and his heirs during her life, and after her decease, to her heirs. Here A. has an estate in fee simple, subject to the remainder to B. for her life, expectant on the event of her marrying again. For A. has still an estate to her and to her heirs. She has the freehold or feudal possession, and after her decease her heirs are to have the same. It matters not to them that a stranger may take it for a while.

But if the ancestor should take no estate of freehold under the gift, but the land should be granted only to his heirs, a very different effect would be produced. In such a case a most material part of the definition of an estate in fee simple would be wanting. For an estate in fee simple is an estate given to a man and his heirs, and not merely to the heirs of a man. The ancestor, to whose heirs the lands were granted, would accordingly take no estate or interest by reason of the gift to his heirs. But the gift, if it should ever take effect, would be a future contingent estate for the person who, at the ancestor's decease, should answer the description of heir to his freehold estates.

### CHAPTER II.

#### OF A CONTINGENT REMAINDER.

But great as is the power of alienation possessed by a tenant in fee simple, as hereinbefore explained, the law has granted to such tenant, and to every other owner to the extent of his estate, a greater power still. For it enables him, under certain restrictions, to grant estates to commence in interest, and not in possession merely, at a future time. So that, during the period which may elapse before the commencement of such estates, the land may be withdrawn from its former liability to complete alienation, and be tied up for the benefit of those who may become the owners of such future estates. The power of alienation is thus allowed to be exercised in some degree to its own destruc-For, till such future estates come into existence, they may have no owners to convey them. Of these future estates there are two kinds, a contingent remainder and an executory interest. The former is allowed to be created by any mode of conveyance. The latter can arise only by the instrumentality of a will, or of a use executed, or made into an estate by the Statute of Uses.

The simplicity of the common law allowed of the creation of no other estates than particular estates, followed by the vested remainders, which have already occupied our attention. A contingent remainder—a remainder not vested, and which never might vest—was long regarded as illegal. Down to the reign of Henry VI. not one instance is to be found of a contingent remainder being held valid.

Perkins lays it down, that, if lands be leased to A. for life, the remainder to the right heirs of J. S., who is alive at the time of the lease, this remainder is good, because there is one named in the lease (namely. A., the lessee for life) who may take immediately in the beginning of the lease. This appears to have been the first instance in which a contingent remainder was allowed. In this case J. S. takes no estate at all; A. has a life interest; and, so long as J. S. is living, the remainder in fee does not vest in any person under the gift; for the maxim is nemo est hæres viventis. and J. S. being alive, there is no such person living as his heir. Here, accordingly, is a future estate, which will have no existence until the decease of J. S.; if, however, J. S. should die in the lifetime of A., and if he should leave an heir, such heir will then acquire a vested remainder in fee simple, expectant on A.'s life interest. But, until these contingencies happen or fail, the limitation to the right heirs of J. S. confers no present estate on any one, but merely gives rise to the prospect of a future estate, and creates an interest of that kind which is known as a contingent remainder.

When contingent remainders began to be allowed, a question arose, which is yet scarcely settled. what becomes of the inheritance, in such a case as this, during the life of J. S.? A., the tenant for life, has but a life interest; J. S. has nothing, and his heir is not yet in existence. The ancient doctrine, that the remainder must vest at once or not at all, has been broken in upon; but the judges could not make up their minds also to infringe on the corresponding rule, that the fee simple must, on every feoffment which confers an estate in fee, at once depart out of the feoffor. They therefore sagely reconciled the rule which they left standing to the contingent remainders which they had determined to introduce, by affirming that, during the contingency, the inheritance was either in abevance, or in gremio legis or else in nubibus. Modern lawyers, however, venture to assert that what the grantor has not disposed of must remain in him, and cannot pass from him until there exists some grantee to receive it. And when the gift is by way of use under the Statute of Uses, there is no doubt that, until the contingency occurs, the use, and with it the inheritance, result to the grantor.

So, in the case of a will, the inheritance, until the contingency happens, descends to the heir of the testator.

A contingent remainder as distinguished from an executory interest, to be hereafter spoken of, is a future estate, which waits for and depends on the determination of the estates which precede it. But, as distinguished from a vested remainder, it is an estate in remainder, which is not ready, from its commencement to its end, to come into possession at any moment when the prior estates may happen to determine. For, if any contingent remainder should, at any time, become thus ready to come into immediate possession, whenever the prior estates may determine, it will then be contingent no longer, but will at once become a vested remainder.

The rules which are required for the creation of a contingent remainder may be reduced to two; of which the first and principal is well established, but the other has occasioned a good deal of controversy. The first of these rules is, that the seisin, or feudal possession, must never be without an owner: and this rule is sometimes expressed as follows, that every remainder of an estate of freehold must have a particular estate of freehold to support it. The ancient law regarded the feudal possession of lands as a matter the transfer of which ought to be notorious; and it accordingly forbade the conveyance of any estate of freehold by any other means than an immediate delivery of the seisin, accompanied by words, either written or openly spoken, by which the owner of the feudal possession miglit at any time thereafter be known to all the neighborhood. If, on the occasion of any feoffment, such feudal possession was not at once parted with, it remained forever with the grantor.

As a corollary to the rule above laid down arises another proposition, namely, that every contingent remainder must vest, or become an actual estate, during the continuance of the particular estate which supports it, or eo instanti that such particular estate determines; otherwise such contingent remainder will fail altogether, and can never become an actual estate at all.

A contingent remainder could not be made to vest on any event which was illegal, or contra bonos mores. Accordingly, no such remainder could be given to a child who may be thereafter born out of wedlock.

In the reports of Lord Coke a rule is laid down that the event on which a remainder is to depend must be a common possibility, and not a double possibility, or a possibility on a possibility, which the law will not allow. This rule appears to owe its origin to the mischievous scholastic logic which was then rife in our courts of law. Respect to the memory of Lord Coke has long kept on foot in our law-books the rule that a possibility on a possibility is not allowed by law in the creation of contingent remainders. But the authority of this rule has long been declining, and a very learned judge 1 declared plainly that it was abolished.

But although the doctrine of Lord Coke, that there can be no possibility on a possibility, has ceased to govern the creation of contingent remainders, there is yet a rule by which these remainders are restrained within due bounds, and prevented from keeping the lands which are subject to them for too long a period beyond the reach of alienation. This rule is the second rule above referred to, and is as follows: that an estate cannot be given to an unborn person for life, followed by any estate to any child of such unborn person, for in such a case the estate given to the child of the unborn person is void.

The opinion which so generally prevails, that every man may make what disposition he pleases of his own estate, has not unfrequently given rise to attempts made by testators to settle their property on future generations beyond the bounds allowed by law; thus lands have been given by will to the unborn son of some living person for his life, and after the decease of such unborn son, to his son or sons in tail. This last limitation to the son or sons of the unborn son in tail, we have observed, is void. The courts of law, however, have been so indulgent to the ignorance of testators, that, in the case of a will, they have endeavored to carry the intention of the testator into effect, as nearly as can possibly be done, without infringing the rule of law; they, accordingly, take the liberty of altering his will to what

¹ Lord St. Leonards, in Cole v. Sewell, 1 Conn. & Laws. 344; s. c. 4 Dru. & War. 1; affirmed in 2 H. of L. Cases, 186.

they presume he would have done had he been acquainted with the rule which prohibits the son of any unborn son from being, in such circumstances, the object of a gift. This, in Law French, is called the cy près doctrine. From what has already been said, it will be apparent that the utmost that can be legally accomplished towards securing an estate in a family is to give to the unborn sons of a living person estates in tail: such estates, if not barred, will descend on the next generation; but the risk of the entail's being barred cannot, by any means, be prevented. The courts, therefore, when they meet with such a disposition as above described instead of confining the unborn son of the living person to the mere life estate given him by the terms of the will, and annulling the subsequent limitations to his offspring, give to such son an estate in tail, so as to afford to his issue a chance of inheriting. should the entail remain unbarred. But this doctrine, being rather a stretch of judicial authority, is only applied where the estates given by the will to the children of the unborn child are estates in tail, and not where they are estates for life, or in fee simple.

The contingency upon which a contingent remainder depends may be of such a kind that the future expectant owner may be now living. For instance, suppose that a conveyance had been made to A. for his life, and, if C. be living at his decease, then to B. and his heirs.

This chance of B.'s obtaining an estate in law is called a possibility; and a possibility of this kind is looked upon in much the same light as a condition of re-entry was anciently regarded, being inalienable at law, and not to be conveyed to another by deed of grant. A fine alone, before fines were abolished, could effectually have barred a contingent remainder. It might, however, be released, that is to say, B. may, by deed of release, give up his interest for the benefit of the reversioner. A contingent remainder was also devisable by will under the old statutes. And it is the rule in equity that an assignment intended to be made of a possibility for a valuable consideration shall be decreed to be carried into effect.

The determination of the particular estate, in order to effect the destruction of the contingent remainder,

was required to be such a determination as would put an end to the right of the tenant to the freehold or feudal possession. A right of entry is sufficient to preserve the contingent remainder; and if the tenant of the particular estate dies whilst out of possession, the contingent remainder might still take effect.

It is rule of law that "whenever a greater estate and a less coincide and meet in one and the same person. without any intermediate estate, the less is immediately annihilated; or, in the law phrase, is said to be merged, that is, sunk or drowned, in the greater." From the operation of this rule, an estate tail is preserved by the effect of the statute De donis. Thus, the same person may have, at the same time, an estate tail, and also the immediate remainder or reversion in fee simple, expectant on the determination of such estate tail. by failure of his own issue. But with regard to other estates. the larger will swallow up the smaller; and the intervention of a contingent remainder which, while contingent, is not an estate. will not prevent the application of the rule. A. thus should have obtained a conveyance of it to himself, before the contingent remainder may be destroyed.

The disastrous consequences which would result from the destruction of the contingent remainder, in such cases, were obviated in practice by means of the interposition of a vested estate. The plan adopted for the preservation of contingent remainders to the children of a tenant for life was to give an estate, after the determination by any means of the tenant's life interest, to certain persons and their heirs during his life, as trustees for preserving the contingent remainders; for which purpose they were to enter on the premises, should occasion require, but should such entry be necessary they were nevertheless to permit the tenant for life to receive the rents and profits during the rest of his life. These trustees were prevented by the Court of Chancery from parting with their estate, or in any way aiding the destruction of the contingent remainders which their estate supported.

As equity follows the law in the limitation of its estates, so it permits an equitable or trust estate to be disposed of by way of particular estate and remainder.

in the same manner as an estate at law. Contingent remainders might also until the recent [English] act have been limited of trust estates. But between such contingent remainders, and contingent remainders of estates at law, there was this difference, that whilst the latter were destructible, the former were not.

# CHAPTER III.

#### OF AN EXECUTORY INTEREST.

Contingent remainders are future estates, which are continually liable, in law, until they actually exist as estates, to be destroyed altogether; executory interests, on the other hand, are future estates, which in their nature are indestructible. They arise, when their time comes, as of their own inherent strength; they depend not for protection on any prior estates, but, on the contrary, they themselves often put an end to any prior estates which may be subsisting.

#### SECTION I.

Of the Means by which Executory Interests may be created.

1. An executory interest may now be created in two ways,—under the Statute of Uses and by will. Executory interests created under the Statute of Uses are called springing or shifting uses. Previously to the passing of this statute, the use of lands was under the sole jurisdiction of the Court of Chancery, as trusts are now. In the exercise of this jurisdiction, it would seem that the Court of Chancery, rather than disappoint the intentions of parties, gave validity to such interests, of a future or executory nature, as were occasionally created in the disposition of the use. For instance, if a feofiment had been made to A. and his heirs, to the use of B. and his heirs from to-morrow, the court would, it seems, have enforced the use in favor of B., notwithstanding that, by the rules of law, the estate of B. would have been void.

Here we have an instance of an executory interest in the shape of a springing use, giving to B. a future estate arising on the morrow of its own strength, depending on no prior estate, and therefore not liable to be destroyed by its prop falling. When the Statute of Uses was passed, the jurisdiction of the Court of Chancery over uses was at once annihilated. But uses in becoming, by virtue of the statute, estates at law, brought with them into the courts of law many of the attributes which they had before possessed while subjects of the Court of Chancery. Amongst others which remained untouched was this capability of being disposed of in such a way as to create executory interests. The legal seisin or possession of lands became then, for the first time, disposable without the observance of the formalities previously required: and, amongst the dispositions allowed, were these executory interests. in which the legal seisin is shifted about from one person to another, at the mercy of the springing uses, to which the seisin has been indissolubly united by the act of Parliament; accordingly, it now happens that, by means of uses, the legal seisin or possession of lands may be shifted from one person to another in an endless variety of ways. We have seen that a conveyance to B. and his heirs to hold from to-morrow is absolutely void. But by means of shifting uses, the desired result may be accomplished; for an estate may be conveyed to A. and his heirs to the use of the conveying party and his heirs until to-morrow, and then to the use of B. and his heirs. A very common instance of such a shifting use occurs in an ordinary marriage settlement of lands. A. to be the settlor, the lands are then conveved by him, by the settlement executed a day or two before the marriage, to the trustees (say B. and C. and their heirs) "to the use of A. and his heirs until the intended marriage shall be solemnized, and from and immediately after the solemnization thereof," to the uses agreed on: for example, to the use of D., the intended husband, and his assigns for his life, and so on. Here B. and C. take no permanent estate at all, as we have already seen. A. continues, as he was, a tenant in fee simple until the marriage; and, if the marriage should never happen, his estate in fee simple will continue with him untouched. But the moment the marriage takes place, without any further

thought or care of the parties, the seisin or possession of the lands shifts away from A. to vest in D., the intended husband, for his life, according to the disposition made by the settlement. After the execution of the settlement, and until the marriage takes place. the interest of all the parties, except the settlor, is future, and contingent also on the event of the marriage. But the life estate of D., the intended husband, is not an interest of the kind called a contingent remainder. For the estate which precedes it, namely, that of A., is an estate in fee simple, after which no remainder The use to D. for his life springs up on the can be limited. marriage taking place, and puts an end at once and forever to the estate in fee simple which belonged to A. Here, then, is the destruction of one estate, and the substitution of another. possession of A. is wrested from him by the use to D., instead of D.'s estate waiting till A.'s possession is over, as it must have done had it been merely a remainder.

From the above example an idea may be formed of the shifts and devices which can now be effected in settlements of land, by means of springing and shifting uses. By means of a use, a future estate may be made to spring up with certainty at a given time. It may be thought, therefore, that contingent remainders, being destructible, would never be made use of in modern conveyancing, but that everything would be made to assume the shape of an executory interest. This, however, is not the case. For, in many instances, future estates are necessarily required to wait for the regular expiration of those which precede them: and, when this is the case, no art or device can prevent such estates from being what they are, contingent remainders. The only thing that can be done is to take care for their preservation, by means of trustees for that purpose. For, the law, having been acquainted with remainders long before uses were introduced into it, will never construe any limitation to be a springing or shifting use, which, by any fair interpretation, can be regarded as a remainder, whether vested or contingent.

The establishment of shifting and contingent uses occasioned great difficulties to the early lawyers, in consequence of the supposed necessity that there should, at the time of the happening of the contingency on which the use was to shift, be some person seised to the use then intended to take effect. If a conveyance were made to B. and his heirs, to the use of A. and his heirs until a marriage or other event, and afterwards to the use of C. and his heirs, it was said that the use was executed in A. and his heirs by the statute. and that as this use was coextensive with the seisin of B., B. could have no actual seisin remaining in him. The event now happens. Who is seised to the use of C.? In answer to this question it was held that the original seisin reverts back to B., and that on the event happening he becomes seised to the use of C. And to support this doctrine it was further held that meantime a possibility of seisin, or scintilla juris, remained vested in B. But this doctrine, though strenuously maintained in theory, was never attended to in practice. And in modern times the opinion contended for by Lord St. Leonards was generally adopted, that in fact no scintilla whatever remained in B., but that he was, by force of the statute. immediately divested of all estate, and that the uses thenceforward took effect as legal estates according to their limitations, by relation to the original seisin momentarily vested in B.

One of the most convenient and usual applications of springing uses occurs in the case of powers, which are methods of causing a use, with its accompanying estate, to spring up at the will of any given person. Thus, lands may be conveyed to A. and his heirs to such uses as B. shall, by any deed or by his will, appoint, and in default of and until any such appointment, to the use of C. and his heirs, or to any other uses. These uses will accordingly confer vested estates on C., or the parties having them, subject to be divested or destroyed at any time by B.'s exercising his power of appointment. Here B., though not owner of the property, has yet the power, at any time, at once to dispose of it, by executing a deed; and if he should please to appoint it to the use of himself and his heirs, he is at perfect liberty so to do; or, by virtue of his power, he may dispose of it by his will. If, however, he should die without having made any appointment by deed or will. C.'s estate. having escaped destruction, will no longer be in danger. Nothing but an appointment by B., in exercise of his power, can defeat or prejudice the estate of C.

Suppose, however, that B. should exercise his power, and appoint the lands by deed to the use of D. and his heirs. In this case, the

execution by B. of the instrument required by the power is the event on which the use is to spring up, and to destroy the estate already existing. The moment, therefore, that B. has duly executed his power of appointment over the use, in favor of D. and his heirs, D. has an estate in fee simple in possession vested in him, by virtue of the Statute of Uses, in respect of the use so appointed in his favor: and the previously existing estate of C, is thenceforth completely at an end. The power of disposition exercised by B. extends, it will be observed, only to the use of the lands; and the fee simple is vested in the appointee, solely by virtue of the operation of the Statute of Uses, which always instantly annexes the legal estate to the use. If, therefore, B. were to make an appointment of the lands, in pursuance of his power, to D, and his heirs, to the use of E. and his heirs, D. would still have the use, which is all that B. has to dispose of; and the use to E. would be a use upon a use, which, as we have seen, is not executed, or made into a legal estate, by the Statute of Uses. E., therefore, would obtain no estate at law: although the Court of Chancerv would, in accordance with the expressed intention, consider him beneficially entitled, and would treat him as the owner of an equitable estate in fee simple, obliging D. to hold his legal estate merely as a trustee for E. and his heirs.

In the exercise of a power it is absolutely nccessary that the terms of the power, and all the formalities required by it, should be strictly complied with. If the power should require a deed only, a will will not do; or, if a will only, then it cannot be exercised by a deed, or by any other act to take effect in the lifetime of the person exercising the power. So, if the power is to be exercised by a deed attested by two witnesses, then a deed attested by one witness only will be insufficient. This strict compliance with the terms of the power was carried to a great length by the courts of law; so much so, that where a power was required to be exercised by a writing under hand and seal attested by uritnesses, the exercise of the power will be invalid if the witnesses do not sign a written attestation of the signature of the deed, as well as of the sealing.

The strict construction adopted by the courts of law, in the case of instruments exercising powers, is in some degree counterbalanced by the practice of the Court of Chancery to give relief in certain cases, when a power has been defectively exercised. If the courts of law have gone to the very limit of strictness for the benefit of the persons entitled in default of appointment, the Court of Chancery, on the other hand, appears to have overstepped the proper boundaries of its jurisdiction in favor of the appointee. For if the intended appointee be a purchaser from the person intending to exercise the power, or a creditor of such person, or his wife, or his child, or if the appointment be for a charitable purpose, — in any of these cases equity will aid the defective execution of the power; in other words, the Court of Chancery will compel the person in possession of the estate, and who was to hold it until the power was duly exercised, to give it up on an undue execution of such power.

The above remarks equally apply to the exercise of a power by will. Every execution of a power to appoint by will must be effected by a will conformed, in the number of its witnesses and other circumstances of its execution, to the requisitions of the power.

As alienation by means of powers of appointment is of a less ancient date than the right of alienation annexed to ownership, so it is free from some of the incumbrances by which that right is still clogged. Thus a man may exercise a power of appointment in favor of himself or of his wife; although a man cannot directly convey, by virtue of his ownership, either to himself or to his wife. A married woman could not formerly convey her estates without a fine, levied by her husband and herself, in which she was separately examined; and now no conveyance of her estates can be made without a deed, in which her husband must concur, and which must be separately acknowledged by her to be her own act and deed. But a power of appointment either by deed or will may be given to any woman; and whether given to her when married or when single, she may exercise such a power without the consent of any husband to whom she may then or thereafter be married; and the power may be exercised in favor of her husband, or of any one else.

A general devise is no execution of a power of appointment by the testator, but operates only on the property that was his own. [Changed by statute in some of the United States.] He ought to give not only all that he has, but also all of which he had any power to dispose.

A power of appointment may sometimes belong to a person concurrently with the ordinary power of alienation arising from the ownership of an estate in the lands. Thus lands may be limited to such uses as A, shall appoint, and in default of and until appointment to the use of A. and his heirs. And in such a case A. may dispose of the lands either by exercise of his power, or by conveyance of his estate. If he exercises his power, the estate limited to him in default of appointment is thenceforth defeated and destroyed; and, on the other hand, if he conveys his estate, his power is thenceforward extinguished, and cannot be exercised by him in derogation of his own conveyance. So if, instead of conveying his whole estate, he should convey only a partial interest, his power would be suspended as to such interest, although in other respects it would remain in force; that is, he may still exercise his power, so only that he do not defeat his own grant. When the same object may be accomplished either by an exercise of the power, or by a conveyance of the estate, care should be taken to express clearly by which of the two methods the instrument employed is intended to operate. Under such circumstances it is very usual first to exercise the power, and afterwards to convey the estate by way of further assurance only; in which case, if the power is valid and subsisting, the subsequent conveyance is of course inoperative; but if the power should by any means have been suspended or extinguished, then the conveyance takes effect.

Besides these general powers of appointment, there exist also powers of a special kind. Of these one of the most usual is the power of leasing which is given to every tenant for life under a properly drawn settlement. A tenant for life, by virtue of his ownership, has no power to make any disposition of the property to take effect after his decease. He cannot, therefore, grant a lease for any certain term of years, but only contingently on his living so long. But if his life estate should be limited to him in the settlement by way of use, as is now always done, a power may be conferred on him of leasing the land for any term of years, and under whatever restrictions may be thought advisable. On the exercise

of this power, a use will arise to the tenant for the term of years, and with it an estate, for the term granted by the lease, quite independently of the continuance of the life of the tenant for life. But if the lease attempted to be granted should exceed the duration authorized by the power, or in any other respect infringe on the restrictions imposed, it would be void altogether as an exercise of the power, and might have been set aside by any person having the remainder or reversion, on the decease of the tenant for life.

Other kinds of special powers occur where the persons who are to take estates under the powers are limited to a certain class. Powers to jointure a wife, and to appoint estates amongst children, are the most usual powers of this nature. When powers are thus given in favor of particular objects, the estates which arise from the exercise of the power take effect precisely as if such estates had been inserted in the settlement by which the power was given.

Powers may generally speaking be destroyed or extinguished by deed of release made by the donee or owner of the power to any person having any estate of freehold in the land; "for it would be strange and unreasonable that a thing, which is created by the act of the parties, should not by their act, with their mutual consent, be dissolved again." The exceptions to this rule appear to be all reducible to the simple principle, that, if the duty of the donee of the power may require him to exercise it at any future time, then he cannot extinguish it by release.

2. An executory interest may also be created by will. Before the passing of the Statute of Uses, wills were employed only in the devising of uses, under the protection of the Court of Chancery, except in some few cities and boroughs where the legal estate in lands might be devised by special custom.

But the passing of the Statute of Uses abolished for a time all wills of uses, until the Statute of Wills restored them. When they were restored, the uses of which they had been accustomed to dispose had been all turned into estates at law; and such estates then generally came, for the first time, within the operation of testamentary instruments. Under these circumstances.

the courts of law, in interpreting wills, adopted the same lenient construction which had formerly been employed by themselves in the interpretation of customary devises, and also by the Court of Chancery in the construction of devises of the ancient use. Future estates were thus allowed to be created by will, and were invested with the same important attribute of indestructibility which belongs to all executory interests. These future estates were called executory devises, and in some respects they appear to have been more favorably interpreted than shifting uses contained in deeds, though generally speaking their attributes are the same. To take a common instance: a man may, by his will, devise lands to his son A., an infant, and his heirs; but in case A. should die under the age of twenty-one years, then to B. and his heirs. In this case A. has an estate in fee simple in possession, subject to an executory interest in favor of B. If A. should not die under age, his estate in fee simple will continue with him unimpaired. But if he should die under that age, nothing can prevent the estate of B. from immediately arising, and coming into possession, and displacing forever the estate of A. and his heirs. Precisely the same effect might have been produced by a conveyance to uses. A convevance to C. and his heirs, to the use of A. and his heirs, but in case A. should die under age then to the use of B. and his heirs. would have effected the same result. Not so, however, a direct conveyance independently of the Statute of Uses. A conveyance directly to A. and his heirs would vest in him an estate in fee simple, after which no limitation could follow. In such a case, therefore, a direction that, if A. should die under age, the land should belong to B. and his heirs, would fail to operate on the legal seisin: and the estate in fee simple of A. would, in case of his decease under age, still descend, without any interruption, to his heir at law.

The alienation of an executory interest, before its becoming an actually vested estate, is subject to the same rules as govern the alienation of contingent remainders.

#### SECTION II.

Of the Time within which Executory Interests must arise.

Secondly, as to the time within which an executory estate or interest must arise. With regard to future estates of a destructible kind, namely, contingent remainders, a limit to their creation is contained in the maxim, that no remainder can be given to the unborn child of a living person for his life, followed by a remainder to any of the issue of such unborn person: the latter of such remainders being absolutely void. This maxim. it is evident, in effect, forbade the tying up of lands for a longer period than can elapse until the unborn child of some living person should come of age; that is, for the life of a party now in being, and for twenty-one years after, - with a further period of a few months during gestation, supposing the child should be of posthumous birth. In analogy, therefore, to the restriction thus imposed on the creation of contingent remainders, the law has fixed the following limit to the creation of executory interests: - it will allow any executory estate to commence within the period of any fixed number of now existing lives, and an additional term of twenty-one years; allowing further for the period of gestation, should gestation actually exist. This additional term of twenty-one years may be independent or not of the minority of any person to be entitled: and if no lives are fixed on, then the term of twenty-one years only is allowed. But every executory estate which might, in any event. transgress this limit, will from its commencement be absolutely For instance, a gift to the first son of A., a living person. who shall attain the age of twenty-four years, is a void gift. a gift to the first son of A. who shall attain the age of twenty-one years will be valid, as necessarily falling within the allowed period. When a gift is infected with the vice of its possibly exceeding the prescribed limit, it is at once and altogether void, both at law and in equity. And even if, in its actual event, it should fall greatly within such limit, yet it is still as absolutely void as if the event had occurred which would have taken it beyond the boundary. If

however, the executory limitation should be in defeasance of, or immediately preceded by, an estate tail, then, as the estate tail and all subsequent estates may be barred by the tenant in tail, the remoteness of the event on which the executory limitation is to arise will not affect its validity.

A further restriction has been imposed by a modern act of Parliament (Stat. 39 & 40 Geo. III., c. 98) on attempts to accumulate the income of property for the benefit of some future owner. This act was occasioned by the extraordinary will of the late Mr. Thellusson, who directed the income of his property to be accumulated during the lives of all his children, grandchildren, and great-grandchildren who were living at the time of his death, for the benefit of some future descendants to be living at the decease of the survivor; thus keeping strictly within the rule which allowed any number of existing lives to be taken as the period for an executory interest. To prevent the repetition of such a cruel absurdity, the act forbids the accumulation of income for any longer term than the life of the grantor or settlor, or twenty-one years from the death of any such grantor, settlor, devisor, or testator, or during the minority of any person living or in ventre sa mère at the death of the grantor. devisor, or testator, or during the minority only of any person who, under the settlement or will, would for the time being, if of full age, be entitled to the income so directed to be accumulated. [Similar statutes exist in some of the United States.]

#### CHAPTER IV.

#### OF HEREDITAMENTS PURELY INCORPOREAL.

Purely incorporeal hereditaments, which, unlike a reversion, a remainder, or an executory interest, are ever of an incorporeal nature, and never assume a corporeal shape, are of three kinds; namely, first, such as are appendant to corporeal hereditaments; secondly, such as are appurtenant; both of which kinds of incorporeal hereditaments are transferred simply by the convey-

ance, by whatever means, of the corporeal hereditaments to which they may belong; and thirdly, such as are in gross, or exist as separate and independent subjects of property, and which are accordingly said to lie in grant, and have always required a deed for their transfer. But almost all purely incorporeal hereditaments may exist in both the above modes, being at one time appendant or appurtenant to corporeal property, and at another time separate and distinct from it.

1. Of incorporeal hereditaments which are appendent to such as are corporeal, the first we shall consider is a seigniory or lordship. Of such of the lands belonging to a manor as the lord granted out in fee simple to his free tenants, nothing remained to him but his seigniory or lordship. By the grant of an estate in fee simple, he necessarily parted with the feudal possession. Thenceforth his interest, accordingly, became incorporeal in its nature. But he had no reversion; for no reversion can remain, as we have already seen. after an estate in fee simple. The grantee, however, became his tenant, did to him fealty, and paid to him his rent service, if any were agreed for. simply having a free tenant in fee simple was called a seigniory. seigniory the rent and fealty were incident, and the seigniory itself was attached or appendant to the manor of the lord who had made the grant; whilst the land granted out was said to be holden of the manor. Very many grants were thus made, until the passing of the statute of Quia emptores put an end to these creations of tenancies in fee simple, by directing that on every such conveyance the feoffee should hold of the same chief lord as his feoffer held before. But such tenancies in fee simple as were then already subsisting were left untouched, and they still remain in all cases in which freehold lands are holden of any manor. The rights belonging to the lord form the incidents of his seigniory. This seigniory, with all its incidents, is an appendage to the manor of the lord, and a conveyance of the manor simply, without mentioning its appendant seigniories, will accordingly comprise the seigniories, together with all rents incident to them.

Other kinds of appendant incorporeal hereditaments are rights of common, such as common of turbary, or a right of cutting turf in another person's land; common of piscary, or a right of fishing in another's water; and common of pasture, which is the most usual, being a right of depasturing cattle on the land of another. These rights are not of very great or general importance. The rights of common now usually met with are of two kinds: one where the tenants of a manor possess rights of common over the wastes of the manor, which belong to the lord of the manor, subject to such rights; and the other, where the several owners of strips of land, composing together a common field, have at certain seasons a right to put in cattle to range over the whole.

In connection with the subject of commons, it may be mentioned that strips of waste land between an enclosure and a

highway, and also the soil of the highway to the middle of the road, presumptively belong to the owner of the enclosure. And a conveyance of the enclosure, even by reference to a plan which does not comprise the highway, will carry with it the soil as far as one half the road.

Where lands adjoin a river, the soil of one half of the river to the middle of the stream is presumed to belong to the owner of the adjoining lands. But if it be a tidal river, the soil up to high-water mark appears presumptively to belong to the Crown. The Crown is also presumptively entitled to the sea-shore up to high-water mark of medium tides. A sudden irruption of the sea gives the Crown no title to the lands thrown under water, although, when the sea makes gradual encroachments, the right of the owner of the land encroached on is as gradually transferred to the Crown. And in the same manner, when the sea gradually retires, the right of the Crown is as gradually transferred to the owner of the land adjoining the coast. But a sudden dereliction of the sea does not deprive the Crown of its title to the soil.

2. Incorporeal hereditaments appurtenant to corporeal hereditaments are not very often met with. They consist of such incorporeal hereditaments as are not naturally and originally appendant to corporeal hereditaments, but have been annexed to them. either by some express deed of grant or by prescription from long enjoyment. Rights of common and rights of way or passage over the property of another person are the principal kinds of incorporeal hereditaments usually found appurtenant to lands. When thus annexed, they will pass by a conveyance of the lands to which they have been annexed. without mention of the appurtenances; although these words, "with the appurtenances," are usually inserted in conveyances, for the purpose of distinctly showing an intention to comprise such incorporeal hereditaments of this nature as may belong to the lands. But if such rights of common or of way, though usually enjoyed with the lands, should not be strictly appurtenant to them, a conveyance of the lands merely, with their appurtenances, without mentioning the rights of common or way, will not be sufficient to comprise them. It is, therefore, usual in conveyances to insert

at the end of the "parcels" or description of the property a number of "general words," in which are comprised not only all rights of way and common, &c., which may belong to the premises, but also such as may be therewith held or enjoyed.

3. Such incorporeal hereditaments as stand separate and alone are generally distinguished from those which are appendant or appurtenant, by the appellation in gross. Of these the first we may mention is a seigniory in gross, which is a seigniory that has been severed from the demessic lands of the manor, to which it was anciently appendant. It is now become quite unconnected with anything corporeal, and, existing as a separate subject of transfer, it must be conveyed by deed of grant.

The next kind of separate incorporeal hereditaments is a rent seck (redditus siccus), a dry or barren rent, so called because no distress could formerly be made for it. This kind of rent affords a good example of the antipathy of the ancient law to any throad on the then prevailing system of tenures. If a landlord granted his seigniory or his reversion, the rent service, which was incident to it, passed at the same time. But if he should have attempted to convey his rent, independently of the seigniory or reversion to which it was incident, the grant would have been effectual to deprive himself of the rent, but not to enable his grantee to distrain for it. It would have been a rent seck. Rent seck also occasionally arose from grants being made of rent charges, to be hereafter explained, without any clause of distress.

Another important kind of separate incorporeal hereditament is a rent charge, which arises on a grant by one person to another of an annual sum of money, payable out of certain lands in which the grantor may have any estate. The rent charge cannot, of course, continue longer than the estate of the grantor; but, supposing the grantor to be seised in fee simple, he may make a grant of a rent charge for any estate he pleases, giving to the grantee a rent charge for a term of years, or for his life, or in tail, or in fee simple. For this purpose a deed is absolutely necessary; for a rent charge, being a separate incorporeal hereditament, cannot, according to the general rule, be created or transferred in any other way, unless indeed it be given by will.

Prior to the statute 4 Geo. II., c. 28, s. 5, it was necessary, on every grant of a rent charge, to give an express power to the grantee to distrain on the premises out of which the rent charge was to issue. If this power was omitted, the rent was merely a rent seck. Rent service, being an incident of tenure, might be distrained for by common right; but rent charges were matters the enforcement of which was left to depend solely on the agreement of the parties.

Incorporeal hereditaments are the subjects of estates analogous to those which may be holden in corporeal hereditaments. If therefore a rent charge should be granted for the life of the grantee, he will possess an estate for life in the rent charge.

A grant of an estate tail in a rent charge scarcely ever occurs in practice. But grants of rent charges for an estate in fee simple are not uncommon.

A rent charge is regarded as a thing entire and indivisible, unlike rent service, which is capable of apportionment. And from this property of a rent charge, the law, in its hostility to such charges, has drawn the following conclusion: that if any part of the land, out of which a rent charge issues, be released from the charge by the owner of the rent, either by an express deed of release, or virtually by his purchasing part of the land, all the rest of the land shall enjoy the same benefit and be released also. If, however, any portion of the land charged should descend to the owner of the rent as heir at law, the rent will not thereby have been extinguished, as in the case of a purchase, but will be apportioned according to the value of the land; because such portion of the land comes to the owner of the rent, not by his own act, but by the course of law.

Although rent charges and other self-existent incorporeal hereditaments of the like nature are no favorites with the law, yet, whenever it meets with them, it applies to them, as far as possible, the same rules to which corporeal hereditaments are subject. Thus, we have seen that the estates which may be held in the one are analogous to those which exist in the other. So estates in fee simple, both in the one and in the other, may be aliened by the owner, either in his lifetime or by his will, to one person or to several as joint tenants or tenants in common,

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and, on his intestacy, will descend to the same heir at law. But in one respect the analogy fails. Land is essentially the subject of tenure. But the receipt of a rent charge is accessory or incident to no other hereditament. True a rent charge springs from and is therefore in a manner connected with the land on which it is charged; but the receiver and owner of a rent charge has no shadow of interest beyond the annual payment, and in the abstract right to this payment his estate in the rent consists. Such an estate therefore cannot be subject to any tenure. If the owner of an estate in fee simple in a rent charge should die intestate, and without leaving any heirs, his estate cannot escheat to his lord, for he has none. It will simply cease to exist, and the lands out of which it was payable will thenceforth be discharged from its payment.

Another kind of separate incorporeal hereditament which occasionally occurs is a right of common in gross. This is, as the name implies, a right of common over lands belonging to another person, possessed by a man, not as appendant or appurtenant to the ownership of any lands of his own, but as an independent subject of property. Such a right of common has therefore always required a deed for its transfer.

# PART IV.

## OF PERSONAL INTERESTS IN REAL ESTATE.

The principal interests of a personal nature, derived from landed property, are a term of years and a mortgage debt.

### CHAPTER I.

## OF PERSONAL PROPERTY AND ITS ALIENATION.

Of real property there can be no such thing as an absolute ownership: the utmost that can be held or enjoyed in real property is an estate. With regard to personal property, however, the primary rule is precisely the reverse. Such property is essentially the subject of absolute ownership, and cannot be held for any estate.

As there can be no estate in personal property, it follows that there can be no such thing as an estate for life in such property, in the strict meaning of the phrase. Thus, if a term of years in land, that is, an interest in land for a certain fixed period, be assigned to A. for his life, A. will at once become entitled in law to the whole term; even though it should be of such a length (for instance, one thousand years) that A. could not possibly live so long. To this rule there is an apparent exception in the case of a will; in which the intention of the testator is now carried into effect, by the application of a the testator is now carried into effect, by the application of a testate. The whole term of years is considered as vesting in the legatee for life, in the same manner as under an assignment by deed; but, on the decease, the term is held to shift

away from him, and to vest, by way of executory bequest, in the person to be next entitled. Accordingly, if a term of years he bequeathed to A. for his life, and after his decease to B., A. will have, during his life, the whole term vested in him, and B. will have no vested estate, but a mere possibility, as it is termed, until after the decease of A.; and this possibility, like the possibility of obtaining a real estate, has hitherto been inalienable at law unless by will, though capable of assignment in equity. It may, however, be deubted whether the doctrine of executory bequests is applicable, in law, to any other chattels than chattels real.

The strict and ancient doctrine of the indivisibility of a chattel, though still retained by the courts of law, has no place in the Court of Chancery, which, in administering equity, carries out to the utmost the intentions of the parties. In equity, therefore, under a gift of personal property of any kind to A. for his life, and after his decease to B. B. has, during the life of A., a vested interest, of which he may dispose at his pleasure; and the Court of Chancery will compel the person to whom the courts of law may have awarded the legal interest to make good the disposition. By the medium of trustees, settlements are constantly made of personal property, substantially the same as the dispositions which may be effected of real estates: and the same rule which confines an executory devise, or shifting use, of lands and tenements, within the period of lives in being, and twenty-one years afterwards, including the period of gestation, applies equally to future or executory interests in property of a personal nature.

One of the most striking points of dissimilarity between a settlement of real estate and a settlement of personal property is this: that, in the one, an estate tail is permitted, whilst in the other, of course, it is not. A gift of personal property of any kind to A. and the heirs of his body will simply vest in him the property given. The same effect will be produced by a gift of such property to him and his heirs. The words "heirs" and "heirs of his body" are quite inapplicable to personal estate: the heir, as heir, has nothing to do with the personal property of his ancestors. A gift of personal property to A. simply, without more, is sufficient to vest in him the absolute

interest. Whilst, under the very same words, he would acquire a life interest only in real estate, as to personal property he will become absolutely entitled.

As no estates can subsist in personal property, it follows that the rules on which contingent remainders in freehold lands have hitherto depended for their existence have never had any application to contingent dispositions of personal property. Such dispositions partake rather of the indestructible nature of executory devises and shifting uses.

Interests in personal property of a future kind may be created through the instrumentality of powers, in the same manner, and to the same extent, as future estates in land. The rules of law respecting the necessity of a compliance with the terms and formalities of the power, whenever it is exercised, and the relief afforded by the Court of Chancery on the defective exercise of a power, apply as well to personal as to real property. Powers over personal estate may also be exercised by women, without their husbands' consent, and also in favor of their husbands, in the same manner as powers over land.

Personal property has never been subject to the feudal rules of tenure. The general rule, therefore, is, and always has been, that such property is alienable, and also subject to involuntary alienation for payment of debts. To voluntary alienation neither deed nor writing was formerly necessary, except when interests of a chattel nature, such as the right of next presentation, were created in separate incorporeal hereditaments. But by the Statute of Frauds no leases, estates, or interests (not being copyhold or customary interests) in any lands, tenements, or hereditaments can be assigned, unless by deed or note in writing, signed by the party so assigning, or his agent thereunto lawfully authorized by writing, or by act or operation of law.

Personal property may also be bequeathed by will. Anciently, by the general common law, a man who left a wife and children could not deprive them by his will of more than one equal third part of his personal property. If, however, he left a wife and no children, or children but no wife, he was then enabled to dispose of half, leaving the other half for the wife or for the children. This ancient rule, however, gradually became subject to many exceptions,

by the customs of particular places, until the rule itself took the place of an exception, and became confined to such places as had a custom in its favor. Now by statute the same mode of execution or attestation to every will is required, whether the property be real or personal.

A will of personal estate has always been considered as operating in a different manner from a will of lands. The latter was, until the recent Wills Act, regarded as a present conveyance, operating at a future time (the death of the testator), by virtue of the ancient Statute of Wills. But a will of personal estate has always been considered as speaking from the death of the testator, being the just sentence of a man's will touching what he would have done after his death. The mode of operation of a will of personalty is also different from the operation of a will of lands in this respect, that in strictness the appointment of an executor was formerly essential to a will of personalty; and, at the present day, the usual and proper method is to appoint an executor, as to the personal estate: whereas, under a devise of landed property, the lands pass at once to the devisee, and the intervention of an executor is quite unnecessary and inapplicable. The executor of a will of personal estate becomes entitled, from the death of the testator, to all his personal property, which, after payment of the debts of the deceased, he is bound to apply according to the directions of the will. Thus, if the testator should specifically bequeath any part of his personal property, the property so bequeathed will not belong absolutely to the legatee until the executor has assented to the bequest; and this assent must not be given until the executor is satisfied that there is sufficient to pay the debts of the deceased, without having recourse to the property so specifically given. If the executor should die before having completely administered the estate of his testator, the executor appointed by the will of such executor will be entitled to complete the distribution of the estate of the testator: and so on until the estate is completely disposed of. The testator. however, may, and usually does, appoint more than one person his executors. In this case, the law regards all the co-executors as one individual person; and, consequently, any of the executors may, during the life of his companions, perform, without their concurrence, all the ordinary acts of administration, such as giving receipts, making payments, and selling and assigning the property. On the decease of any of them, the office survives to those who remain; and this survivorship operates to such an extent, that, if one of them should renounce the executorship in the lifetime of his companions, he may, at any time, change his mind and undertake the office; but if, having survived all his companions, he should then renounce, he cannot afterwards interfere. When there are two or more executors, the executor of the will of the survivor of them will, after the decease of all of them, be entitled to act as executor of their testator.

The most striking difference, however, between a will of personal estate and a will of lands, yet remains to be noticed. A will of lands has always operated and still operates as a mode of conveyance, requiring no extrinsic sanction to render it available as a document of title. But a will of personal estate requires to be proved in some Ecclesiastical Court. [With us this jurisdiction is vested in probate, surrogate's, orphans', or other similar courts.]

The Ecclesiastical Courts have also jurisdiction over the goods of persons dying intestate. [With us this jurisdiction is also vested in the courts mentioned above.] This jurisdiction, though of long standing, appears to have been at first gradually acquired.

It was enacted in the reign of Edward I. (Stat. 13 Edw. I., c. 19) that the ordinary [in whom this jurisdiction was vested] should be bound to answer the debts of an intestate, so far as his goods would extend, in the same manner as the executors would have been bounden, if he had made a testament. The right of the creditor was thus clothed with a remedy; for, under this statute, an action at law might be brought by the creditor against the ordinary for the payment of his debt; but the right of the relatives to the surplus remained undefined.

The duty of administering intestates' effects was not usually performed by the bishops in person. For this purpose they usually appointed an administrator; but, as personal property rose in importance, it became desirable that this administrator should not be considered as the mere agent of the bishop, but should himself

have a locus standi in the king's courts. It was ascordingly enacted by a statute of the reign of Edward III. (31 Edw. III., c. 11), that. where a man died intestate, the ordinaries should depute the next and most lawful friends of the deceased to administer his goods. which persons so deputed should have action to demand and recover, as executors, the debts due to the deceased, to administer and dispend for the soul of the dead; and should answer also, in the king's courts, to others to whom the deceased was holden and bound, in the same manner as executors should answer. subsequent statute (21 Hen. VIII., c. 5), administration may be granted to the widow of the deceased, or to the next of his kin, or to both, as by the discretion of the ordinary shall be thought good. The administrator, when appointed, has the same right to all the personal estate of the intestate as his executors would have had if he had made a will; and the same duty also devolves upon him of paying the debts in the first place. Supposing a will should have been made, but the executors should have all renounced, or died before their testator, the administrator appointed must then conform to the directions of the will; in which case, the administration granted to him is called an administration cum testamento annexo, with the will annexed. But if, as in most cases, there is no will, then the surplus, after payment of the debts, must be distributed amongst the relatives of the intestate, in proportions to be hereafter mentioned. The office of administrator is not transmissible, like the office of executor. On the decease of an administrator, before he has distributed all the effects of the intestate, a new administrator must be appointed; for the administrator or executor of such administrator has no right to intermeddle. So, if an executor should die intestate, without having completely distributed his testator's effects, an administrator must be appointed to distribute, according to the will of the testator, such of his effects as were not distributed by the deceased executor. In each of these cases, the administration granted is called an administration de bonis non administratis, - of the goods not administered. or, more shortly, de bonis non.

The application of an intestate's effects, after payment of his debts, is now regulated by statutes of the reign of Charles II. and James II. (22 & 23 Car. II., c. 10; 1 Jac. II., c. 17, a. 7),

commonly called the Statutes of Distribution by which statutes the rights of the relations of the deceased appear to have been first definitively ascertained, and rendered legally available. Under these statutes, if the intestate leave a widow and any child or children, the widow shall take a third part of the surplus of his effects. If he leave no child, she shall have a moiety. In this respect, the distribution is the same as took place under the ancient law. husband of a married woman is entitled to the whole of her effects (Stat. 29 Car. II., c. 3, s. 25). If the intestate leave children, two thirds of his effects if he leave a widow, or the whole if he leave no widow, shall be equally divided amongst his children, or, if but one. to such one child. But the descendants of such children as may have died in the intestate's lifetime shall stand in the place of their parent or ancestor. Such children, however, as have been advanced by the parent in his lifetime, must bring the amount of their advancement into hotohpot, so as to make the estate of all the children to be equal, as nearly as can be estimated. But the heir at law, notwithstanding any land he may have by descent or otherwise, from the intestate, is to have an equal part in the distribution with the rest of the children, without any consideration of the value of such land (Stat. 22 & 23 Car. II., c. 10, s. 5). If the intestate leave no children or representatives of them, his father, if living, takes the whole; or, if the intestate should have left a widow, one half. If the father be dead, the mother, brothers, and sisters of the intestate shall take in equal shares (Stat. 1 Jac. II., c. 17, s. 7), subject, as before, to the widow's right to a moiety; and brothers or sisters of the half-blood have an equal claim with those of the whole blood. If any brother or sister shall have died in the lifetime of the intestate, leaving children, such children shall stand in loco parentis, provided the mother or any brother or sister be living. If there be no brother or sister, or child of such brother or sister, the mother shall take the whole, or, if the widow be living. a moiety only, as before; but a stepmother can take nothing. If there be no mother, the brothers and sisters take equally, the children of such as may be dead standing in loco parentis. Beyond brothers' and sisters' children, no right of representation belongs to the children of relatives with respect to the share which their deceased parents would have taken. And if there be neither brother,

sister, nor mother of the intestate living, his personal estate will be distributed in equal shares amongst those who are next in degree of kindred to him. But if he should have no kindred, the Crown, by virtue of its prerogative, will stand in their place; but subject always to the widow's right to a moiety, in case she should survive. [The student should here consult the statutes of his State.]

## CHAPTER II.

#### OF A TERM OF YEARS.

At the present day, one of the most important kinds of chattel or personal interests in landed property is a term of years, by which is understood, not the time merely for which a lease is granted, but also the interest acquired by the lessee. Terms of years may be considered as of two kinds : first. those which are created by ordinary leases, which are subject to a yearly rent, which seldom exceed ninety-nine years, and in respect of which so large a number of the occupiers of lands and houses are entitled to their occupation; and, secondly, those which are created by settlements, or mortgage deeds, in respect of which no rent is usually reserved, which are frequently of one thousand years or more, which are often vested in trustees, and the object of which is usually to secure the payment of money by the owner of the land. But although terms of years of different lengths are thus created for different purposes, it must not therefore be supposed that a long term of years is an interest of a different nature from a short one. On the contrary, all terms of years of whatever length possess precisely the same attributes in the eye of the law.

The consideration of terms of the former kind, or those created by ordinary leases, may conveniently. Attacked by a short notice of a tenancy at will, and a tenancy by sufferance. A tenancy at will may be created by parol or by deed; it arises when a person lets land to another, to hold at the will of the

lessor or person letting. The lessee, or person taking the lands, is called a tenant at will; and, as he may be turned out when his landlord pleases, so he may leave when he likes. tenant at will is not answerable for mere permissive waste. is allowed, if turned out by his landlord, to reap what he has sown. or, as it is legally expressed, to take the emblements. But, as this kind of letting is very inconvenient to both parties, it is scarcely ever adopted; and, in construction of law, a lease at an annual rent, made generally without expressly stating it to be at will, and without limiting any certain period, is not a lease at will, but a lease from year to year, of which we shall presently speak. When property is vested in trustees, the cestui que trust is, as we have seen, absolutely entitled to such property in equity. But as the courts of law did not recognize trusts, they consider the cestui que trust, when in possession, to be merely the tenant at will of his trustees, although absolutely entitled in equity.

▲ tenancy by sufferance is when a person, who has originally come into possession by a lawful title, holds such possession after his title has determined.

A lease from year to year is a method of letting very commonly adopted: in most cases it is much more advantageous to both landlord and tenant than a lease at will. The advantage consists in this, that both landlord and tenant are entitled to notice before the tenancy can be determined by the other of them. notice must be given at least half a year before the expiration of the current year of the tenancy; for the tenancy cannot be determined by one only of the parties, except at the end of any number of whole years from the time it began. So that, if the tenant enter on any quarter day, he can quit only on the same quarter day: when once in possession, he has a right to remain for a year: and if no notice to quit be given for half a year after he has had possession, he will have a right to remain two whole years from the time he came in; and so on from year to year. A lease from year to year can be made by parol or word of mouth, if the rent reserved amount to two thirds at least of the full improved value of the lands; for if the rent reserved do not amount to so much, the Statute of Frauds declares that such parol lease shall have the force and effect of a lease at will only. (29 Car. II.,

c. 3, ss. 1, 2.) A lease from year to year, reserving a less amount of rent, can also be made by deed. The best way to create this kind of tenancy is to let the lands to hold "from year to year" simply, for much litigation has arisen from the use of more circuitous methods of saying the same thing.

A lease for a fixed number of years may, by the Statute of Frauds, be made by parol, if the term do not exceed three years [one year in most of the United States] from the making thereof, and if the rent reserved amount to two thirds, at least, of the full improved value of the Iand. (29 Car. II., c. 3, s. 2.) Leases for a longer term of years, or at a lower rent, were required, by the Statute of Frauds, to be put into writing and signed by the parties making the same, or their agents thereunto lawfully authorized by writing. But a lease of a separate incorporeal hereditament was always required to be made by deed.

It does not require any formal words to make a lease for years. The words commonly employed are "demise, lease, and to farm let;" but any words indicating an intention to give possession of the lands for a determinate time will be sufficient.

There is no limit to the number of years for which a lease may be granted; a lease may be made for ninety-nine, one hundred, one thousand, or any other number of years; the only requisite on this point is, that there be a definite period of time fixed in the lease, at which the term granted must end; and it is this fixed period of ending which distinguishes a term from an estate of freehold. Besides this fixed time for the term to end, there must also be a time fixed from which the term is to begin; and this time may, if the parties please, be at a future period.

When the lease is made, the lessee does not become complete tenant by lease to the lessor until he has entered on the lands let. Before entry, he has no estate, but only a right to have the lands for the term by force of the lease, called in law an interesse termini. But if the lease should be made oy a bargain and sale, or any other conveyance operating by virtue of the Statute of Uses, the lessee will have the whole term vested in him at once, in the same manner as if he had actually entered.

The circumstance, that a lease for years was anciently nothing more than a mere contract, explains a curious point of law relating to the creation of leases for years, which does not hold with respect to the creation of any greater interest in land. If a man should by indenture lease lands, in which he has no legal interest, for a term of years, both lessor and lessee will be estopped during the term to deny the validity of the lease. But the law goes further, and holds that if the lessor should at any time during the lease acquire the lands he has so let, the lease, which before operated only by estoppel, shall now take effect out of the newly acquired estate of the lessor, and shall become for all purposes a regular estate for a term of years. If, however, the lessor has, at the time of making the lease, any interest in the lands he lets, such interest only will pass, and the lease will have no further effect by way of estoppel, though the interest purported to be granted be really greater than the lessor had at the time power to grant. Leases for years, taken for the purpose of occupation, are usually made subject to the payment of a vearly rent, and to the observance and performance of certain covenants, amongst which a covenant to pay the rent is always included. The rent and covenants are thus constantly binding on the lessee, during the whole continuance of the term, notwithstanding any assignment which he may make. On assigning leasehold premises, the assignee is therefore bound to enter into a covenant with the assignor, to indemnify him against the payment of the rent reserved, and the observance and performance of the covenants contained in the lease. The assignee, as such, is liable to the landlord for the rent which may be unpaid, and for the covenants which may be broken during the time that the term remains vested in him, although he may never enter into actual possession, provided that such covenants relate to the premises let: and a covenant to do any act upon the premises, as to build a wall, is binding on the assignee, if the lessee has covenanted for himself and his assigns to do the act. But a covenant to do any act upon premises not comprised in the lease cannot be made to bind the assignee. Covenants which are binding on the assignee are said to run with the land.

the burden of such covenants passing with the land to every one to whom the term is from time to time assigned. But when the assignee assigns to another, his liability ceases as to any future breach. In the same manner, the benefit of covenants relating to the land, entered into by the lessor, will pass to the assignee; for, though no contract has been made between the lessor and the assignee individually, yet, as the latter has become the tenant of the former, a privity of estate is said to arise between them, by virtue of which the covenants entered into, when the lease was granted, become mutually binding, and may be enforced by the one against the other. This mutual right is also confirmed by an express clause of the statute before referred to (Stat. 32 Hen. VIII., c. 34, s. 2), by which assignees of the reversion were enabled to take advantage of conditions of re-entry contained in leases. By the same statute, also, the assignee of the reversion is enabled to take advantage of the covenants entered into by the lessee with the lessor, under whom such assignee claims. an advantage, however, which in some cases he is said to have previously possessed.

The payment of the rent, and the observance and performance of the covenants, are usually further secured by a proviso or condition for re-entry, which enables the landlord or his heirs (and the statute above mentioned enables his assigns), on non-payment of the rent, or on non-observance or non-performance of the covenants, to re-enter on the premises let, and repossess them as if no lease had been made. If an express license be once given by the landlord for the breach of any covenant, or if the covenant be not to do a certain act without license, and license be once given by the landlord to perform the act, the right of re-entry is gone forever. (Dumpor's Case, 4 Rep. 119.)

Leasehold estates may be bequeathed by will. As leaseholds are personal property, they devolve in the first place on the executors of the will, in the same manner as other personal property; or, on the decease of their owner intestate, they will pass to his administrator.

Leasehold estates are also subject to involuntary alienation for the payment of debts. Under the old law, leasehold estates, being goods or chattels merely, were not bound

by judgments until a writ of execution was actually in the hands of the sheriff or his officer.

The tenant for a term of years may, unless restrained by express covenant, make an underlease for any part of his term; and any assignment for less than the whole term is in effect an underlease. On the other hand, any assurance purporting to be an underlease, but which comprises the whole term, is in effect an assignment.

Every underlessee becomes tenant to the lessee who grants the underlease, and not tenant to the original lessor. Between him and the underlessee, no privity is said to exist. Thus the original lessor cannot maintain any action against an underlessee for any breach of the covenants contained in the original lease. remedy is only against the lessee, or any assignee from him of the The derivative term, which is vested in the underwhole term. lessee, is not an estate in the interest originally granted to the lessee: it is a new and distinct term, for a different, because a less. period of time. It certainly arises and takes effect out of the original term, and its existence depends on the continuance of such term, but still, when created, it is a distinct chattel, in the same way as a portion of any movable piece of goods becomes, when cut out of it, a separate chattel personal.

If a married woman should be possessed of a term of years, her husband may dispose of it at any time during the coverture, and in case he should survive her he will be entitled to it by his marital right. But if he should die in her lifetime it will survive to her, and his will alone will not be sufficient to deprive her of it. [These rules are changed by statute in many of the United States.]

Frequent use is made in conveyancing of long terms of years, generally for the purpose of securing the payment of money. For this purpose, a long term of say one thousand years is created, which is vested (when the parties to be paid are numerous, or other circumstances make such a course desirable) in trustees, upon trust out of the rents and profits of the premises, or by sale or mortgage thereof for the whole or any part of the term, to raise and pay the money required, as it may become due, and upon trust to permit the owners of the land to receive the residue of the rents and profits.

If the money should be paid, or should not ultimately be required, the method most usually adopted in modern times is by inserting in the deed by which the term is created a proviso that the term shall cease, not only at its expiration by lapse of time, but also in the event of the purposes for which it is created being fully performed and satisfied, or becoming unnecessary, or incapable of taking effect.

The merger of a term of years may be occasioned by the intentional or accidental union of the term and the immediate free-hold in one and the same person. Merger, being a legal incident of estates, formerly occurred quite irrespectively of the trusts on which they may be held; but equity did its utmost to prevent any injury being sustained by a cestui que trust, the estate of whose trustees may accidentally have merged. The law, though it did not recognize the trusts of equity, yet took notice of some few cases of property being held by one person in right of another, or in autre droit, as it is called; and in these cases the general rule was that the union of the term with the immediate freehold would not cause any merger, if such union were occasioned by the act of law, and not by the act of the party.

There is yet another method of disposing of a term when the purposes for which it was created have been accomplished. not destroyed by a proviso for cesser, or by a merger in the freehold, it may be kept on foot for the benefit of the owner of the property for the time being. A term, as we have seen, is an instrument of great power, yet easily managed; and in case of a sale of the property, it may be a great protection to the purchaser. Suppose, therefore, that, after the creation of such a term as we have spoken of, the whole property is sold. The purchaser, in this case, will often prefer having the term still kept on foot, and assigned by the trustees to a new trustee of his own choosing, in trust for himself, his heirs and assigns; or, as it was technically said in trust to attend the inheritance. The reason for this proceeding is that the former owner may, possibly, since the commencement of the term, have created some incumbrance upon the property, of which the purchaser is ignorant, and against which, if existing, he is of course desirous of being protected. The preferable method. therefore, always is to avoid any merger of the term; but, on the contrary, to obtain an assignment of it to a trustee in trust for the purchaser, his heirs and assigns, and to attend the inheritance.

If the purchaser, at the time of his purchase, should have had notice of the rent charge, and should yet have procured an assignment of the term to a trustee for his own benefit, the Court of Chancery would, on the first principles of equity, prevent his trustee from making any use of the term to the detriment of the grantee of the rent charge.

## CHAPTER III.

#### OF A MORTGAGE DEBT.

The term mortgage debt is here employed for want of one which can more precisely express the kind of interest intended to be spoken of. Every person who borrows money, whether upon mortgage or not, incurs a debt or personal obligation to repay out of whatever means he may possess: and this obligation is usually expressed in a mortgage deed in the shape of a covenant by the borrower to repay the lender the money lent, with interest at the rate agreed on. If, however, the borrower should personally be unable to repay the money lent to him, or if, as occasionally happens, it is expressly stipulated that the borrower shall not be personally liable to repay, then the lender must depend solely upon the property mortgaged; and the nature of his interest in such property, here called his mortgage debt, is now attempted to be explained. In this point of view, a mortgage debt may be defined to be an interest in land of a personal nature. which was recognized as such only by the Court of Chancery, in its office of administering equity. In equity, a mortgage debt is a sum of money, the payment whereof is secured, with interest, on certain lands; and being money, it is personal property, subject to all the incidents which appertain to such property. The courts of law, on the other hand, did not regard a mortgage in the light of a mere security for the repayment of money with interest. A mortgage in law is an absolute conveyance, subject to an agreement for a reconveyance on a certain given event. Thus, let us suppose freehold lands to be conveyed by A., a person seised in fee, to B. and his heirs, subject to a proviso that on repayment on a given future day, by A, to B., of a sum of money then lent by B. to A., with interest until repayment, B. or his heirs will reconvey the lands to A, and his heirs; and with a further proviso, that, until default shall be made in payment of the money, A. and his heirs may hold the land without any interruption from B. or his heirs. Here we have at once a common mortgage of freehold land. A., who conveys the land, is called the mortgagor: B., who lends the money, and to whom the land is conveyed, is called the mortgagee. The conveyance of the land from A. to B. gives to B., as is evident, an estate in fee simple at law. He thenceforth becomes, at law, the absolute owner of the premises, subject to the agreement under which A. has a right of enjoyment, until the day named for the payment of the money; on which day, if the money be duly paid, B. has agreed to reconvey the estate to A. If, when the day comes, A. should repay the money with interest. B. of course must reconvey the lands; but if the money should not be repaid punctually on the day fixed, there is evidently nothing on the face of the arrangement to prevent B. from keeping the lands to himself and his heirs forever. The courts of law, adhering to the strict literal meaning of the term, hold that if A. did not nav or tender the money punctually on the day named, he shall lose the land forever. When the day named for payment had passed, the mortgagee, if not repaid his money, might at any time have brought an action of ejectment against the mortgagor without any notice, and thus have turned him out of possession.

The Court of Chancery holds that, after the day fixed for the payment of the money has passed, the mortgagor has still a right to redeem his estate, on payment to the mortgage of all principal, interest, and costs due upon the mortgage to the time of actual payment. This right is called the nortgagor's equity of redemption; and no agreement with the meditor, expressed in any terms, however stringent, can deprive he debtor of this equitable right, on payment within a reasonable time. If, therefore, after the day fixed in the deed for payment.

the mortgagee should, as he still may, eject the mortgagor by an action of ejectment in a court of law, the Court of Chancery will nevertheless compel him to keep a strict account of the rents and profits; and, when he has received so much as will suffice to repay him the principal money lent, together with interest and costs, he will be compelled to reconvey the estate to his former debtor.

In equity the mortgagee is properly considered as having no right to the estate, further than is necessary to secure to himself the due repayment of the money he has advanced, together with interest for the loan; the equity of redemption which belongs to the mortgager renders the interest of the mortgagee merely of a personal nature, namely, a security for so much money.

In a court of law, the mortgagee is absolutely entitled; and the estate mortgaged may be devised by his will, or, if he should die intestate, will descend to his heir at law; but in equity he has a security only for the payment of money, the right to which will, in common with his other personal estate, devolve on his executors or administrators, for whom his devisee or heir will be a trustee; and when they are paid, such devisee or heir will be obliged by the Court of Chancery, without receiving a sixpence for himself, to reconvey the estate to the mortgagor.

The Court of Chancery will not, however, allow the debtor forever to deprive the mortgagee, his creditor, of the money which is his due; and if the mortgagor will not repay him within a reasonable time, equity will allow the mortgagee forever to retain the estate to which he is already entitled at law. For this purpose it will be necessary for the mortgagee to file a bill of foreclosure against the mortgagor, praying that an account may be taken of the principal and interest due to him, and that the mortgagor may be directed to pay the same, with costs, by a short day to be appointed by the court, and that in default thereof he may be foreclosed his equity of redemption. A day is then fixed by the court for payment: which day, however, may, on the application of the mortgagor, good reason being shown, be postponed for a time. Or, if the mortgagor should be ready to make repayment before the cause is brought to a hearing, he may do so at any time previously, on making proper application to the court, admitting the title of

the mortgagee to the money and interest. If, however, on the day ultimately fixed by the court, the money should not be forthcoming, the debtor will then be absolutely deprived of all right to any further assistance from the court; in other words, his equity of redemption will be foreclosed, and the mortgagee will be allowed to keep, without further hindrance, the estate which was conveyed to him when the mortgage was first made.

A more simple and less expensive remedy is now usually provided in mortgage transactions by a power given by the mortgage deed to the mortgagee, without further authority, to sell the premises in case default should be made in payment. When such a power is exercised, the mortgagee, having the whole estate in fee simple at law, is of course able to convey the same estate to the purchaser; and, as this remedy would be ineffectual if the concurrence of the mortgagor were necessary, it has been decided that his concurrence cannot be required by the purchaser. The mortgagee, therefore, is at any time able to sell; but, having sold, he has no further right to the money produced by the sale than he had to the lands before they were sold. He is at liberty to retain to himself his principal, interest, and costs; and having done this, the surplus, if any, must be paid over to the mortgagor.

Mortgages of freehold lands are sometimes made for long terms, such as one thousand years. But this is not now often the case, as the fee simple is more valuable, and therefore preferred as a security.

Leasehold estates also frequently form the subjects of mortgage. The term of years of which the estate consists is assigned by the mortgagor to the mortgagee, subject to a proviso for redemption or reassignment on payment, on a given day, by the mortgagor to the mortgagee, of the sum of money advanced, with interest; and with a further proviso for the quiet enjoyment of the premises by the mortgagor until default shall be made in payment. The principles of equity as to redemption apply equally to such a mortgage as to a mortgage of freeholds. A power of sale also is frequently inserted in a mortgage of leaseholds.

In some cases the exigency of the circumstances will not admit of time to prepare a regular mortgage; a deposit of the title deeds is then made with the mortgagee; and notwithstanding the stringent provision of the Statute of Frauds to the contrary, it has been held by the Court of Chancery that such a deposit, even without any writing, operates as an equitable mortgage of the estate of the mortgagor in the lands comprised in the deeds. [Very uncommon in the United States. It has been recognized by decisions in a few States, and rejected in others.]

When lands are sold, but the whole of the purchase money is not paid to the vendor, he has a lien in equity on the lands for the amount unpaid, together with interest at four per cent, the usual rate allowed in equity. [This doctrine has been adopted in some of the United States, and rejected in others.] And the circumstance of the vendor having taken from the purchaser a bond or a note for the payment of the money will not destroy the lien. But if the vendor take a mortgage of part of the estate, or any other independent security, his lien will be gone. If the sale be made in consideration of an annuity, it appears that a lien will subsist for such annuity, unless a contrary intention can be inferred from the nature of the transaction.

Mortgages are frequently transferred from one person to another. In such a case the mortgage debt and interest are assigned by the old to the new mortgagee; and the lands which form the security are conveyed, or, if a leasehold, assigned, by the old to the new mortgagee, subject to the equity of redemption which may be subsisting in the premises; that is, subject to the right in equity of the mortgagor or his representatives to redeem the premises on payment of the principal sum secured by the mortgage, with all interests and costs.

During the continuance of a mortgage, the equity of redemption which belongs to the mortgagor is regarded by the Court of Chancery as an estate, which is alienable by the mortgagor, and descendible to his heir, in the same manner as any other estate in equity; the court in truth regards the mortgagor as the owner of the same estate as before, subject only to the mortgage. In the event of the decease of the mortgagor, the lands mortgaged will consequently devolve on the devisee under his will, or, if he should have died intestate, on his heir. And the mortgage debt, to which the lands are subject, is

payable in the first place, like all other debts, out of the personal estate of the mortgagor.

The equity of redemption belonging to the mortgagor may again be mortgaged by him, either to the former mortgagee by way of further charge, or to any other person. lands are mortgaged, as occasionally happens, to several persons, each ignorant of the security granted to the other, the general rule is that the several mortgages rank as charges on the lands in the order of time in which they were made, according to the maxim, Qui prior est tempore, potior est jure. But as the first mortgagee alone obtains the legal estate, he has this advantage over the others. that if he takes a further charge on a subsequent advance to the mortgagor, without notice of any intermediate second mortgage, he will be preferred to an intervening second mortgagee. third mortgagee, who has made his advance without notice of a second mortgage, can procure a transfer to himself of the first mortgage, he may tack, as it is said, his third mortgage to the first, and so postpone the intermediate incumbrancer. [The doctrine of tacking has not been adopted in the United States. | For in a contest between innocent parties, each having equal right to the assistance of the court, the one who happens to have the legal estate is preferred to the others; the maxim being that, when the equities are equal, the law shall prevail.

A mortgage may be made for securing the payment of money which may thereafter become due from the mortgager to the mortgagee. Where a mortgage extends to future advances, it has been decided that the mortgagee cannot safely make such advances, if he have notice of an intervening second mortgage.

# PART V.

## OF TITLE.1

Every charter or deed of feoffment in ancient times usually ended with a clause of warranty, by which the feoffor agreed that he and his heirs would warrant, acquit, and forever defend the feoffee and his heirs against all persons. Even if this warranty were not expressly inserted, still it would seem that the word give, used in a feoffment, had the effect of an implied warranty. [In some of the States implied warranties are abolished by statute, and all warranties are express.] But the force of such implied warranty was confined to the feoffor only, exclusive of his heirs, whenever a feoffment was made of lands to be holden of the chief lord of the fee. Under an express warranty, the feoffor, and also his heirs, were bound, not only to give up all claim to the lands themselves, but also to give to the feoffee or his heirs other lands of the same value, in case of the eviction of the feoffee or his heirs by any person having a prior title; and this warranty was binding on the heir of the feoffor whether he derived any lands by descent from the feoffor or not, except only in the case of the warranty commencing, as it was said, by disseisin. The right to bind the heir by warranty even with this exception was found to confer on the ancestor too great a power, and the force of such a warranty has accordingly been greatly restrained by statutes, enacted to meet special cases of hardship.

In addition to an express warranty, there were formerly some words used in conveyancing, which in themselves implied a covenant for quiet enjoyment; and one of these words, namely, the

<sup>&</sup>lt;sup>1</sup> The system of registration universally prevailing in this country renders the subject matter of this Part of comparatively little importance. Such matters as seem of interest have, however, been retained.

word demise, still retains this power. Thus, if one man demises and lets land to another for so many years, this word demise operates as an absolute covenant for the quiet enjoyment of the lands by the lessee during the term. But if the lease should contain an express covenant by the lessor, limited to his own acts only, such express covenant showing clearly what is intended will nullify the implied covenant, which the word demise would otherwise contain. So, as we have seen, the word-give formerly implied a personal warranty; and the word grant was supposed to have implied a warranty, unless followed by an express covenant, imposing on the grantor a less liability. And, by the Registry Acts for Yorkshire. the words, grant, bargain, and sell, in a deed of bargain and sale of an estate in fee simple, enrolled in the Register Office, imply covenants for the quiet enjoyment of the lands against the bargainor, his heirs and assigns, and all claiming under him. and also, for further assurance thereof, by the bargainor, his heirs and assigns, and all claiming under him, unless restrained by express words. [Similar statutes exist in some of the United States.] The word grant, by virtue of some other acts of Parliament, also implies covenants for the title.

Modern covenants for title are five in number. The first covenant is that the vender is seised in fee simple; the next, that he has good right to convey the lands; the third, that they shall be quietly enjoyed; the fourth, that they are free from incumbrances; and the last, that the vendor and his heirs will make any further assurance for the conveyance of the premises which may reasonably be required. [A general covenant of warranty is often added.]

On any sale or mortgage of lands, all the title deeds in the hands of the vendor or mortgagor, which relate exclusively to the property sold or mortgaged, are handed over to the purchaser or mortgagee. [In this country, where we have adopted the registry system under which every transfer or incumbrance of real estate is made a matter of record, this is seldom done.] The possession of the deeds is of the greatest importance; for if the deeds were not required to be delivered, it is evident that property might be sold or mortgaged over and over again to different persons without much risk of discovery.

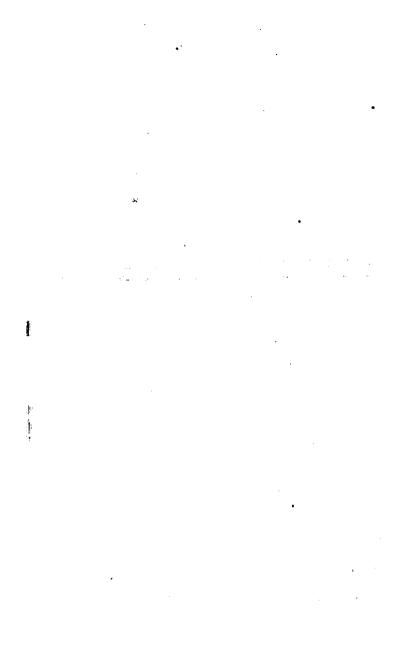
Where the title deeds relate to other property, and cannot consequently be delivered over to the purchaser, he is entitled, at the expense of the vendor, to a covenant for their production, and also to attested copies of such of them as are not enrolled in any court of record.

When the lands sold are situated in either of the counties of Middlesex or York, search is made in the registries established for those counties.

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# BEST ON EVIDENCE.



# THE LAW OF EVIDENCE.

# BOOK I.

THE ENGLISH LAW OF EVIDENCE IN GENERAL

## PART I.

GENERAL VIEW OF THE ENGLISH LAW OF EVIDENCE.

The characteristic features of the English common law system of judicial evidence are essentially connected with the constitution of the tribunal by which it is administered, and may be stated as consisting of three great principles. 1. The admissibility of evidence is matter of law, but the weight or value of evidence is matter of fact. 2. Matters of law, including the admissibility of evidence, are proper to be determined by a fixed, matters of fact by a casual tribunal; but this is a principle which found little favor with the Court of Chancery, and has gradually become a less integral part of the whole English system. 3. In determining the admissibility of evidence, the production of the best evidence should be exacted.

The Court of Chancery always decided questions of fact without the assistance of a jury, except where a legal right came into question, when it "directed an issue" to a court of common law. Justices of the peace, too, have been empowered since the time of Edward the Third to convict persons summarily for trivial offences. But the ordinary common law tribunal for deciding issues of fact consists of a court composed of one or more judges, learned in the law and armed

with its authority, assisted by a jury of twelve men, unlearned in the law, taken indiscriminately from among the people of the county where the venue is laid. In some few instances the trial was, at common law, by the court without a jury; i. e. trial by the record, inspection, certificate, and witnesses. And modern legislation has to a very considerable extent allowed the parties to dispense with a jury.

Where the trial is by jury, jurors may be challenged by the litigant parties for want of the requisite qualifications, as well as for certain causes likely to exercise an undue influence on their decision; in addition to which persons accused of treason or felony are allowed to challenge peremptorily without cause, the former as many as thirty-five, the latter twenty, of the panel. The court is charged with the general conduct of the proceedings: it decides all questions of law and practice, including the admission and rejection of evidence; and when the case is ripe for adjudication sums it up to the jury, explaining the questions in dispute, with the law as bearing on them, pointing out on whom the burden of proof lies, and recapitulating the evidence, with such comments and observations as may seem fitting. Moreover, "Whether there be any evidence, is a question for the judge. Whether sufficient evidence, is for the jury."

On the other hand, the decision of the facts in issue is the exclusive province of the jury; who are therefore to hear the evidence and the comments made on it, to determine the credit due to the testimony of the witnesses, and to draw all requisite inferences of fact from the evidence. This division of the functions of the judge and jury is expressed by the maxim, "Ad anæstionem facti non respondent judices; ad quæstionem juris non respondent iuratores." But this maxim must be taken with these limitations: First. Facts on which the admissibility of evidence depends are determined by the court, not by the jury. Thus, whether a sufficient foundation is laid for the reception of secondary evidence, is for the judge; and if the competency of a witness turns on any disputed fact he must decide it. Secondly. The jury thus far incidentally determine the law, that their verdict is usually general, i. e. guilty or not guilty. for the plaintiff or for the defendant; such a verdict being menifestly compounded of the facts, and the law as applicable to them. But although the jury have always a right to find a verdict in this form, yet if they feel any doubt about the law, or distrust their own powers of applying it, they may find the facts specially, and leave the court to pronounce judgment according to law on the whole matter.

The rules of evidence are of three kinds:—1st. Those which relate to evidence in causa, i. e. evidence adduced to prove the questions in dispute. 2d. Those affecting evidence extra causam, or that which is used only to test the accuracy of media of proof. 3d. Rules of forensic practice respecting evidence. With regard to evidence in causa,—"the judges and sages of the law have laid it down that there is but one general rule of evidence, the best that the nature of the case will admit." "The true meaning of the rule of law that requires the greatest evidence that the nature of the thing is capable of, is this: that no such evidence shall be brought which ex natura rei supposes still a greater evidence behind, in the party's own possession and power."

The true meaning of this fundamental principle will be best understood by considering the three chief applications of it. Evidence, in order to be receivable, should come through proper instruments, and be in general original, and proximate. With respect to the first of these, with the exception of a few matters which either the law notices judicially, or which are deemed too notorious to require proof, the judge and jury must not decide facts on their personal knowledge; and they should be in a state of legal ignorance of everything relating to the questions in dispute before them, until established by legal evidence, or legitimate inference from it.

The next branch of this rule is that which exacts original and rejects derivative evidence, and prescribes that no evidence shall be received which shows, on its face, that it only derives its force from some other which is withheld. The terms "primary" and "secondary" evidence are used by our law in the limited sense of the original and derivative evidence of written documents; the latter of which is receivable when, by credible testimony, the existence of the

primary source has been established and its absence explained. But derivative evidence of other forms of original evidence is in general rejected absolutely; as where supposed oral evidence is delivered through oral, and the various other sorts of evidence comprised in practice under the very inadequate phrase "hearsay evidence."

The remaining application of this great principle seems based on the maxim, "In jure non remota causa, sed proxima spectatur." It may be stated thus, that, as a condition precedent to the admissibility of evidence, either direct or circumstantial, the law requires an open and visible connection between the principal and evidentiary facts, whether they be ultimate or subalternate. This does not mean a necessary connection, — that would exclude all presumptive evidence, — but such as is reasonable, and not latent or conjectural.

Whether a given fact, bearing indirectly on a matter in issue, should be received as circumstantial, or rejected as conjectural evidence, is often a question of extreme difficulty. One test, perhaps, is to consider whether any imaginable number of pieces of evidence, such as that tendered, could be made the ground of decision: for it is the property of a chain of genuine circumstantial evidence, that, however inconclusive each link is in itself, the concurrence of all the links may amount to proof, often of the most convincing kind.

The rules of evidence are in general the same in civil and criminal proceedings; and bind alike crown and subject, prosecutor and accused, plaintiff and defendant, counsel and client. There are, however, some exceptions. Thus the doctrine of estoppel has a much larger operation in civil proceedings. So an accused person may, at least if undefended by counsel, rest his defence on his own unsupported statement of facts, and the jury may weigh the credit due to that statement; whereas, in civil cases, nothing must be opened to the jury which it is not intended to substantiate by proof. Again, confessions or other self-disserving statements of prisoners will be rejected if made under the influence of undue promises of favor, or threats of punishment; but there is no such rule respecting similar statements in civil cases.

So, although both these branches of the law have each their peculiar presumptions, still the technical rules regulating the burden of proof cannot be followed out in all their niceties when they press against accused persons.

But there is a strong and marked difference as to the effect of evidence in civil and criminal proceedings. In the former, a mere preponderance of probability, due regard being had to the burden of proof, is a sufficient basis of decision; but in the latter, especially when the offence charged amounts to treason or felony, a much higher degree of assurance is required. The persuasion of guilt ought to amount to a moral certainty; or, "Such a moral certainty as convinces the minds of the tribunal, as reasonable men, beyond all reasonable doubt."

Again, the psychological question of the intent with which acts are done, plays a much greater part in criminal than in civil proceedings. The maxim, "Actus non facit reum, nisi mens sit rea," runs through the criminal law, although in some instances a criminal intention is conclusively presumed from certain acts; while in civil actions, to recover damages for misconduct or neglect, it is in general no answer that the defendant did not intend mischief.

And here a question presents itself, whether and how far the rules of evidence may be relaxed by consent. In criminal cases, at least in treason and felony, it is the duty of the judge to see that the accused is condemned according to law; and, the rules of evidence forming part of that law, no admissions from him or his counsel will be received. On the other hand, however, much latitude in putting questions and making statements is given, de fecto if not de jure, to prisoners who are undefended by counsel. no consent could procure the admission of evidence which public policy requires to be excluded; such as secrets of state and the Moreover, no admission at a trial will dispense with proof of the execution of certain attested instruments, though the instrument itself may be admitted before the trial, with the view to save the trouble and expense of proving it. Subject, however, to these and some other exceptions, the general principles, "Quilibet potest renunciare juri pro se introducto," -- "Omnis consensus tollit errorem." - seem to apply to evidence in civil cases; and much inadmissible evidence is constantly received in practice, because the opposing counsel either deems it not worth while to object, or thinks its reception will be beneficial to his client.

Whether the rules respecting the incompetency of witnesses could be dispensed with by consent seems never to have been settled.

Of all checks on the mendacity and misrepresentations of witnesses, the most effective is the requiring their evidence to be given viva voce, in presence of the party against whom they are produced, who is allowed to "crossexamine" them, i. e. to ask them such questions as he thinks may serve his cause. The great tests of the truth of any narrative are the consistency of its several parts, and the possibility and probability of the matters narrated.

The other great check is the publicity of our judicial proceedings,—our courts of justice being open to all persons; and in criminal cases the bystanders are even invited by proclamation to come forward with any evidence they may possess affecting the accused. Most of the advantages of secret examination, without its dangers, are attainable by examining the witnesses out of the hearing of each other,—a practice constantly adopted in courts of common law, when combination among them is suspected, or the testimony of one is likely to exercise a dangerous influence over others.

## PART II.

HISTORY OF THE RISE AND PROGRESS OF THE ENG-LISH LAW OF EVIDENCE: WITH ITS ACTUAL STATE AND PROSPECTS.

[The subject matter of Part II., while of great interest, is not of such practical importance as to warrant the space it would here occupy. Lack of space compels the editor to omit everything not really necessary to be known by the student.]

## BOOK II.

## INSTRUMENTS OF EVIDENCE

By "Instruments of Evidence" are meant the media through which the evidence of facts, either disputed or required to be proved, is conveyed to the mind of a judicial tribunal. The word "instrument" has, however, both with ourselves and the civilians, a secondary sense, i. e. denoting a particular kind of document. These instruments of evidence are of three kinds:—

- 1. "Witnesses," persons who inform the tribunal respecting facts.
  - 2. "Real Evidence," evidence from things.
- 3. "Documents,"—evidence supplied by material substances, on which the existence of things is recorded by conventional marks or symbols.

## PART I.

#### WITNESSES.

A witness may be defined, a person who gives evidence to a judicial tribunal. This subject may be considered under three heads:—

- 1. What persons are compellable to give evidence.
- The incompetency of witnesses; or who are disqualified from giving evidence.
- 8. The grounds of suspicion of testimony.

#### CHAPTER I.

#### WHAT PERSONS ARE COMPELLABLE TO GIVE EVIDENCE.

The law allows no excuse for withholding evidence which is relevant to the matters in question before its tribunals, and is not protected from disclosure by some principle of legal policy. A person, therefore, who, without just cause, absents himself from a trial, at which he has been duly summoned to attend as a witness, or a witness who refuses to give evidence, or to answer questions which the court rules proper to be answered, is liable to punishment for contempt.

No action lies against a witness in respect of his evidence. He is absolutely privileged as to anything he may as a witness do in reference to the cause. It is a settled rule, however, that a witness is not to be compelled to answer any question, the answering which has a tendency to expose him to a criminal prosecution, or to proceedings for a penalty, or for a forfeiture even of an estate or interest.

Husbands and wives do not seem to be bound to answer questions tending to criminate each other; but the authorities are somewhat conflicting.

In order to entitle a witness to refuse to answer a question, on the ground that it might tend to criminate him, the question need not be such that the answer thereto would, itself, be evidence against him on a criminal charge; it is sufficient if the answer might furnish a link in a chain of evidence which might implicate him in such a charge.

When the grounds of privilege are before the court, it is for the court, and not for the witness or party interrogated, to decide as to their sufficiency.

Prior to the passing of the Common Law Procedure Act, 1854, although it was settled that a witness is compellable to answer questions having a tendency to disgrace him, as, for instance, whether he was ever convicted of an offence, if the questions be relevant to the issue in the cause, there was great doubt whether he is also

compellable to answer questions relating to collateral matters, and only put in order to test his credit.

These enactments leave the doubt unsolved with regard to questions not named therein, e. g. whether the witness has ever been guilty of a dishonorable act. The better opinion seems to be, that such questions may be put, and must if the presiding judge require, but not otherwise, be answered. On this subject three points should be borne in mind:—

- 1. The object of the cross-examining party is, in general, sufficiently attained by putting the question; for the silence of a person, to whom in his hearing a crime or disgraceful act is imputed, is in many instances tantamount to confession.
- 2. Cases may arise where the judge, in the exercise of his discretion, would interpose to protect the witness from unnecessary and unbecoming annoyance, e. g. in answering questions respecting alleged improprieties of conduct, which furnish no real ground for assuming that a witness who could be guilty of them would not be a man of veracity.
- 3. Where a witness is asked a question which tends to disgrace him, and answers the question, the cross-examiner is in general bound by the answer so given, because the question goes only to the credit of the witness, which is a collateral matter, and to admit evidence to contradict him would be to raise a question not relevant to the issue.

## CHAPTER II.

#### INCOMPETENCY OF WITNESSES.

The distinction between the competency and the credibility of witnesses: A witness is said to be incompetent to give evidence, when the judge is bound as matter of law to reject his testimony, either generally or on some particular subject; in all other cases it is to be received, and its credibility weighed by the jury.

Incompetency in a witness will not be presumed. It

comes in the shape of an exception or objection to the witness: and if the facts on which it rests are disputed, they must, like all other collateral questions of fact, be determined by the judge: who, in cases of doubt, is always disposed to receive the witness. and let the objection go to his credibility rather than to his comnetency. In many cases the ground of incompetency is apparent to the senses of the judge; as where a witness presents himself in a state of intoxication, or is an obvious lunatic, or is of such tender vears that the judge deems a preliminary inquiry into his religious knowledge essential, and the like. But the ordinary mode of ascertaining whether a witness is competent is by examining him on what is called the voir dire. i. e. a sort of preliminary examination by the judge, in which the witness is required to speak the truth with respect to the questions put to him: when, if incompetency appears from his answers, he is rejected, and, even if they are satisfactory, the judge may receive evidence to contradict them, or establish other facts showing the witness to be incompetent.

The only grounds on which the evidence of a witness can with any appearance of reason be rejected, unheard, are reducible to four. 1. That he has not that degree of intellect which would enable him to give a rational account of the matters in question. 2. That he cannot or will not guarantee the truth of his statements by the sanction of an oath, or what the law deems its equivalent. 3. That he has been guilty of some crime or misconduct, showing him to be a person on whose veracity reliance would most probably be misplaced. 4. That he has a personal interest in the success or defeat of one of the litigant parties.

In the great case of Omychund (or Omichund) v. Barker (1 Atk. 21), in 1744-45, a commission to examine witnesses in the East Indies having been issued by the Court of Chancery, the commissioners certified that they had examined several persons professing the Gentoo religion, whose evidence was delivered on oath, taken in the usual and most solemn form in which oaths were most usually administered to witnesses who profess that religion, and in the same manner in which oaths were usually administered to such witnesses, in the courts of justice erected by letters

patent at Calcutta. On account of its importance, Lord Chancellor Hardwicke was assisted at the hearing of the cause by Lee, C. J., Willes, C. J., and Parker, C. B.; when, on its being proposed to read as evidence the deposition of one of those persons, the defendants' counsel objected that, in order to render a person a competent witness, he must be sworn in the usual way upon the Evangelists. and that the law of England recognized no other form of oath. Each of the judges delivered an able and elaborate judgment; in which they showed clearly that oaths are not peculiar to the Christian religion, having been in constant use, not only in the ancient world, but among men in every age: that the substance of an oath is essentially the same in all cases: namely, an invocation of a Superior Power to attest the veracity of a statement made by a party. acknowledging his readiness to avenge falsehood, and in some cases invoking that vengeance: consequently, that the mode of swearing is not the material part of the oath, and ought to be adjusted to suit the conscience of the witness. however agreed that infidels, who do not believe in a God or a state of rewards and punishments, cannot be admitted as witnesses; and although from some of the language in that case and in other books it might be supposed that a belief on the part of the witness in a future state of reward and punishment is required, the better opinion is that belief in an avenger of falsehood generally is the only thing needful, the time and place of punishment being mere matter of circumstance.

With respect to the incompetency of witnesses on the ground of interest, the Court of Queen's Bench in Lord Kenyon's time laid down as a clear and certain rule for the future, that, in order to render a witness incompetent on that ground, it must appear either that he was directly interested in the event of the suit; or that he could avail himself of the verdict in the cause, so as to give it in evidence on some future occasion in support of his own claim. [Objections to the competency of witnesses on the ground of interest have been very generally removed in this country, the fact of interest going only to the credibility, and not the competency, of the witness.]

There is another ground of incompetency which has been altogether abolished by statute in England, namely, infamy of

character. "Repellitur a sacramento infamis" was the rule of law; and in determining what offences should be deemed infamous an artificial distinction was taken, which caused the whole system to work very unevenly. We allude to the distinction between the infamia juris and the infamia facti,— between the infamy of an offence viewed in itself, and that arbitrarily attributed to it by law,—it being a principle that some offences, although minoris culpae, were majoris infamiae. Treason and felony stood at the head. A conviction for misdemeanor did not in general render a witness incompetent; but to this there was the general exception of offences coming under the description of the orimen falsi,—such as forgery, perjury, subornation of perjury, various forms of conspiracy, and the like.

In all cases the incompetency was created, not by the conviction, but by the judgment of the court pronounced against the offender. Incompetency on the ground of infamy was removable of course by reversal of the judgment, and, in general, by pardon, by having undergone the punishment awarded for the offence.

I. Incompetency from want of reason and understanding. The causes of this incompetency are twofold; — Deficiency of intellect. and Immaturity of intellect. The objection on the first of these grounds rarely presents itself to the competency of a witness; and if the defect appears in the course of his examination, it is usually made matter of comment to the jury.

Our books lay down generally that persons of "non-sane memory," and who have not the use of reason, are excluded from giving evidence.

Who are thus excluded? According to Lord Coke, "Non compos mentis is of four sorts. 1. An idiot, which from his nativity, by a perpetual infirmity, is non compos mentis. 2. He that by sickness, grief, or other accident, wholly loses his memory and understanding. 3. A lunatic that hath sometime his understanding and sometime not, and therefore he is called non compos mentis so long as he hath not understanding.

4. Lastly, he that by his own vicious act for a time depriveth himself of his memory and understanding, as he

that is drunken." A similar classification is adopted in modern works on evidence. These four sorts of persons are incompetent witnesses, until the cause of incompetency is removed. A lunatic while in a lucid interval is a competent witness; likewise the evidence of a monomaniac, i. e. a person insane on only one subject, can be received on matters not connected with his delusion.

In such cases the judge must determine the competency, and the jury the credibility. Before he is sworn, the insane person may be cross-examined, and witnesses called to prove circumstances which might show him to be inadmissible; but, in the absence of such proof, he is prima facie admissible, and the jury must attach what weight they think fit to his testimony.

As to the degree of mental alienation which disqualifies from giving evidence, if mental alienation is to be retained in our law as a ground of incompetency, it should be restricted to cases where it is found impossible to communicate with the witness, so as to make him understand that he is in a court of justice and expected to speak the truth. Any eccentricities or aberrations which fall short of this are surely only matter of comment to the jury, as to the reliance to be placed on the testimony.

With respect to the evidence of children the rule is now settled that an infant, though under the age of seven years, may be sworn in a criminal prosecution, provided such infant appears, on strict examination by the court, to possess a sufficient knowledge of the nature and consequences of an oath; for there is no precise or fixed rule, as to the time within which infants are excluded from giving evidence; but their admissibility depends upon the sense and reason they entertain of the danger and impiety of falsehood, which is to be collected from their answers to questions propounded to them by the court; but if they are found incompetent to take an oath, their testimony cannot be received.

II. "Incompetency from want of religion." An oath is a recognition by the speaker of the presence of an invisible Being superior to man, ready and willing to punish any deviation from truth, invoking that Being to attest the truth of what is uttered,

and in some cases calling down his vengeance in the event of false-hood. Courts of justice in most nations exact an oath as a condidition precedent to the reception of evidence; and among us, in particular, "In judicio non creditur nisi juratis" has been a legal maxim from the earliest time. By the common law, the evidence of a witness must be rejected who either was ignorant, or who denied the existence, of such a superior power, or refused to give the required security to the truth of his testimony; and the present source of incompetency may accordingly be considered under three heads: 1st. Want of religious knowledge; 2d. Want of religious belief; and 3d. Refusal to comply with religious forms.

The first of these may be disposed of in a word; the exception arising principally in the case of children, whose competency has already been considered. But the same principles apply where an adult deficient in the requisite religious knowledge is offered as a witness.

2d. Incompetency for want of religious belief. This has been in a great degree anticipated in a former part of this chapter. Every person ought to be admitted to give evidence who believes in a Divine Being, the avenger of falsehood and perjury among men, and who consents to invoke by some binding ceremony the attestation of that Power to the truth of his deposition.

Disbelief in the existence and moral government of God is not to be presumed. If such disbelief exist, this is a psychological fact, and is consequently incapable of proof except by the avowal of the party himself, or the presumption arising from circumstances. According to most of our text writers and the usual practice, the proper and regular mode of procedure is by examining the party himself, while some authorities go so far as to assert that this is the only mode. No question can be asked beyond whether he believes in a God, the avenger of falsehood, and will designate a mode of swearing binding on his conscience; and if he complies with these, he cannot be asked whether he considers any other mode more binding, for such a question is unnecessary and irrelevant.

The ordinary form of swearing in English courts of

common law is well known. The witness, holding the New Testament in his bare right hand, is addressed by the officer of the court in a form which varies according to the nature of the proceedings.

In criminal cases, when the accused is in custody, it runs thus:—

"The evidence that you shall give to the court and jury, sworn between our sovereign lady the Queen and the prisoner at the bar, shall be the truth, the whole truth, and nothing but the truth: So help you God."

When the accused is not in custody, the form is the same, except that he is then described as "the defendant."

In civil cases it is: ---

"The evidence that you shall give to the court and jury, touching the matters in question, shall be the truth, the whole truth, and nothing but the truth: So help you God."

The witness then kisses the book.

But if a witness allows himself to be sworn in either of these forms, or in any other form, without objecting, he is liable to be indicted for perjury if his testingony prove false.

Witnesses are to be sworn in that form which they consider binding on their consciences. Members of the Kirk of Scotland, and others, who object to kissing or touching the book, have been sworn by lifting up the hand while it lay open before them. In Ireland, Roman Catholics are (or at least were) sworn on a New Testament with a cross delineated on the cover. Jews are sworn on the Pentateuch, keeping on their hats, the language of the oath being changed from "So help you God," to "So help you Jehovah." Mohammedans are sworn on the Koran.

Atheism, and other forms of infidelity which deny all exercise of divine power in rewarding truth and punishing false-hood, continue to be recognized as grounds of incompetency. But it may be gravely questioned whether this state of the law ought to be maintained, and whether it is not more properly an objection to the credit than to the competency of the witness. The common law rules upon this subject have been changed by legislation in England and some of the United States of America, whereby the

want of religious belief is treated as an objection to the credit, not to the competency, of a witness.

3d. The refusal by the person called as a witness to comply with religious forms. A perverse refusal to be sworn was treated as a contempt of court; but great difficulty had arisen in modern times, from the circumstance that several sects of Christians, and individual members of other sects, entertained conscientious objections to the use of oaths. The legislature [both in England and the United States], where these scruples are bona fide, has substituted for an oath a solemn affirmation or declaration, rendering, however, a false affirmation or declaration punishable as perjury.

III. Incompetency from interest. [By statute now, both in England and the United States, objections to a witness on the ground of interest extend no longer to competency, but only affect the credibility of the witness.]

A striking exception to the common law rule, which excluded the evidence of parties interested in the event of a suit, or question at issue, is to be found in the old system of allowing persons indicted for treason or felony to become approvers, which has been replaced by the modern practice of receiving the evidence of accomplices.

Although in strictness a jury may legally (except where two witnesses are required by law) convict on the unsupported evidence of an accomplice or socius criminis; yet it is a rule of general and usual practice—now so generally followed as almost to have the force of law—for the judge to advise the jury not to convict on the evidence of an accomplice alone. It is not necessary, however, that the story told by the accomplice should be corroborated in every circumstance he details in evidence. Again, it seems now settled that the corroboration should not be merely as to the corpus delicti, but should go to some circumstances affecting the identity of the accused as participating in the transaction. It is thought that confirmatory evidence by the wife of an accomplice will not suffice, for they must for this purpose be considered as one person. Neither ought the jury to be satisfied merely with the evidence of several accomplices who corroborate each other.

The other persons affected by this rule of exclusion were the

husbands and wives of the parties to the suit or proceeding. [In this country this rule has been to a greater or less degree changed by statute.] It was a general rule of the common law that the husband cannot be a witness for or against the wife, nor the wife be a witness for or against the husband. This rule was not limited to protecting from disclosure matters communicated in nuptial confidence, or facts the knowledge of which had been acquired in consequence of the relation of husband and wife; but was an absolute prohibition of the testimony of the witness to any facts affecting the husband or wife, as the case might be, however the knowledge of those facts might have been acquired. But the rule only applied where the husband or wife was party to the suit or proceeding, in which the other was called as a witness, and did not extend to collateral proceedings between third parties. The declarations of a wife, acting as the lawfully constituted agent of her husband, were admissible against him, like the declarations of any other lawfully constituted agent.

The common law made an exception to this rule, where one of the married parties used or threatened personal violence to the other. Thus, on an indictment against a man for assault and battery of his wife, or vice versa, the injured party is a competent witness; and husband and wife may swear the peace against each other.

The case of bigamy presents some difficulty. The first wife, or husband, as the case may be, is not a competent witness against the accused; but the second wife or husband is, after proof of the first marriage, for then the second marriage is a nullity.

What is the rule on this subject in cases of high treason is a disputed point. Many eminent authorities lay down, that in such cases the testimony of married persons is receivable against each other. There is, however, high authority the other way; and most of the modern text writers seem disposed to consider the evidence not receivable.

Before dismissing the subject of the incompetency of witnesses, it will be necessary to advert to certain persons who, in consequence of their peculiar position or functions, may seem incompetent to give evidence. And foremost among these stands the Sovereign.

It has been made a question whether he can be examined as a witness in our courts of justice, and, if so, whether the examination must be on oath in the usual way. Conceding, of course, that no compulsory process could be used to obtain the evidence, it seems that both questions ought to be answered in the affirmative.

The other persons to whom we have alluded, as apparently incompetent to give evidence, are the counsel and solicitors engaged in a cause, and the judges and jurymen by whom it is It is settled law, and every day's practice, that a solicitor is a competent witness either for or against his client; although neither solicitor nor counsel will be permitted, without the consent of the client, to disclose matters communicated to him in professional confidence. But whether the counsel in a cause are competent witnesses, was formerly a disputed question. can be no doubt that to call an advocate in the cause as a witness is most objectionable, and should be avoided whenever possible. But we apprehend that a judge has no right in point of law to reject him; although, if the court above were of opinion that, under all the circumstances, any practical mischief had resulted from the reception of such a witness. they might, in their discretion, grant a new trial, if not as matter of right, at least as matter of judgment.

A juryman may be a witness for either of the parties to a cause which he is trying But here an important distinction must be borne in mind, viz. the difference between general information, and particular personal knowledge. "A juror cannot give a verdict founded on his own private knowledge. . . If, therefore, a juror know any fact material to the issue, he ought to be sworn as a witness, and is liable to be cross-examined; and if he privately state such facts, it will be a ground of motion for a new trial."

Lastly, with respect to judges. It is no objection to the competency of a witness, that he is named as a judge in the commission under which the court is sitting. But a distinction has been taken with respect to the judge who is actually trying the cause. Sir John Hawles says (11 How. St. Tr. 459): "Every man knows that a judge in a civil matter tried before him has been enforced to give evidence, for in that particular a judge

ceases to be a judge, and is a witness; of whose evidence the jury are the judges, though he after reassume his authority, and is afterwards a judge of the jury's verdict." There can be no doubt, however, that if a judge gives evidence he must be sworn, and be examined and cross-examined like any other witness.

An arbitrator may be called as a witness in an action to enforce his award, and may be asked what passed before him, and what matters were presented to him for consideration, but not what passed in his own mind when exercising his discretionary powers as to the matters submitted to him.

#### CHAPTER III.

#### GROUNDS OF SUSPICION OF TESTIMONY.

"Exceptions to the credit of the witness," says Sir Matthew Hale, "do not at all disable him from being sworn, but yet may blemish the credibility of his testimony; and in such case the witness is to be allowed, but the credit of his testimony is left to the jury, who are judges of the fact, and likewise of the probability or improbability, credibility or incredibility, of the witness and his testimony; and these exceptions are of that great variety and multiplicity, that they cannot easily be reduced under rules or instances." [They have been immensely increased in consequence of the statutes respecting interest of witnesses in the event of the cause. The tendency now is to make all objections go to the credibility rather than the competency of witnesses.]

Pecuniary interest was formerly a ground of incompetency; and in order to estimate its weight, the condition and circumstances in life of the witness should, if practicable, be ascertained and taken into consideration.

A powerful source of false testimony is to be found in the relations between the sexes. Previous to the 16 & 17 Vict., c. 83, husband and wife were incompetent witnesses for or against each other in most civil, as they still are in most criminal cases. But the existence of any other relation of this kind — such as that of a

man with his kept mistress, etc. — only goes to the credit of a witness.

The interest arising out of other domestic and social relations may have its source either in affection, desire of revenge, or a dread of oppression or vexation. In the laws of some countries, blood relationship within certain degrees has been made a ground of incompetency; and friendship or enmity with one of the litigant parties may justly cause evidence to be looked on with suspicion. Among us, however, this only goes to the credit of the witness.

Perjury is often committed to preserve the reputation of the swearer. An example of this may be seen in those cases, and they are of frequent occurrence, where the person called as a witness has, on some former occasion, given a certain account of the transaction about which he is interrogated, and is afraid or ashamed to retract that account.

The last source of bias which we shall notice is the feeling of interest in or affection for others. A man who belongs to a body, or is a member of a secret society, governed by principles unknown to the rest of mankind, comes before the tribunal loaded with the passions of others in addition to his own. To this head belong those cases where mendacious evidence is given through the sympathy generated by a similarity of station in life, or a coincidence of social, political, or religious opinions, and the like.

## PART II.

#### REAL EVIDENCE.

"Real Evidence"—the evidentia rei vel facti of the civilians—means all evidence of which any object belonging to the class of things is the source; persons also being included, in respect of such properties as belong to them in common with things. Thus, formerly, on an appeal of mayhem, the court would

in some cases inspect the wound, in order to see whether it were a mayhem or not.

Real evidence is either immediate or reported. Immediate real evidence is where the thing which is the source of the evidence is present to the senses of the tribunal. This is of all proof the most satisfactory and convincing; but it is rarely available, at least with respect to principal facts.

In some cases the production of certain species of real evidence is peremptorily exacted, to the exclusion of all substitutes. Thus, it is an established rule that a prisoner shall not be convicted of murder, "unless the fact were proved to be done, or at least the body be found dead." But real evidence is often produced at trials, when it is not exacted by any rule either of law or practice. Valuable evidence of this kind is sometimes given by means of accurate and verified models, or by what is technically termed a "view," i. e. a personal inspection by some of the jury of the locus in quo, — a proceeding allowed in certain cases by the common law, in criminal as well as in civil cases.

Reported real evidence is where the thing which is the source of the evidence is not present to the senses of the tribunal, but the existence of it is conveyed to them through the medium of witnesses or documents. This sort of proof is, from its very nature, less satisfactory and convincing than immediate real evidence.

Circumstantial real evidence partakes of the nature of all other circumstantial evidence in this, that the persuasions or inferences to which it gives rise are sometimes necessary and sometimes only presumptive. And as it is in criminal proceedings that the value and dangers of this mode of proof are chiefly conspicuous, we shall devote the rest of this chapter to a consideration of its probative force and infirmative hypotheses in those proceedings. By "infirmative fact" or "hypothesis" is meant any fact or hypothesis which, while insufficient in itself either to disprove or render improbable the existence of a principal fact, yet tends to weaken or render infirm the probative force of some other fact which is evidentiary of it.

In the case of necessary inferences, properly so called, there can be no infirmative facts or hypotheses. As instances: where a female was found dead in a room, with every sign of having met a violent end, the presence of another person at the scene of action was demonstrated by the bloody mark of a left hand visible on her left arm.

Cases of this kind are, however, of rare occurrence, and when they do present themselves, the facts speak too plainly to need comment. In the vast majority of instances, the inference to which a piece of circumstantial real evidence gives rise is only probable or presumptive. On charges of homicide, for instance, the nature of the weapon with which the fatal blow was given is of the utmost importance in determining whether malice existed or ought to be presumed. But physical coincidences and dissimilarities, often of a most singular kind, frequently lead to the discovery of the perpetrators of offences. or establish the innocence of parties wrongly accused. stances of the former are given by Starkie. Thus, in a case of burglary, - where the thief gained admittance into the house by opening a window with a penknife, which was broken in the attempt. - part of the blade was left sticking in the window-frame. and a broken knife, the fragment of which corresponded with that in the frame, was found in the pocket of the prisoner.

Strong, however, as coincidences and dissimilarities of this nature undoubtedly are, we must be careful not to attribute to them, when standing alone, a conclusive effect in all cases. It should be remembered that the man who was found in possession of the broken knife might have picked it up where it had been thrown by the real criminal.

It is when taken in connection with other evidence that physical coincidences and dissimilarities are chiefly valuable; and then they certainly press with fearful weight on a criminal. But if their presence is powerful for conviction, their absence is at least equally powerful for exculpation.

The infirmative hypotheses affecting real evidence. Considered in the abstract, real evidence, apparently indicative of guilt, may be indebted for its criminative shape to accident, forgery, or the lawful action of the accused. Here it must not be forgotten that sometimes the most innocent men cannot explain or give any account whatever of facts which seem to criminate them; and the

experience of almost every person will supply him with instances of extraordinary occurrences, the cause of which is, to him at least, completely wrapped in mystery.

- I. Accident. The appearance of blood on the clothes of an accused or suspected person may be explained by his having, in the dark, come in contact with a bleeding body. Under this head come those cases where the appearance is the result of irresponsible agency; as where the act has been done by a party in a state of somnam bulism.
- II. The forgery of real evidence is in some degree analogous to the subornation of personal evidence, being an attempt to pervert and corrupt the nature of things or real objects, and thus force them to speak falsely.

Forgery of real evidence may have its origin in any of the following causes: 1. Self-exculpation. 2. The malicious intention of injuring the accused, or others. 3. Sport, or with the view of effecting some moral end.

- 1. Self-exculpative forgery of real evidence. An excellent instance of the danger to be apprehended from this source is given by Sir Matthew Hale. After observing that the recent and unexplained possession of stolen property raises a strong presumption of larceny, he tells us of a case tried, as he says, before a very learned and wary judge, where a man was condemned and executed for horse-stealing, on the strength of his having been found upon the animal the day it was stolen, but whose innocence was afterwards made clear by the confession of the real thief; who acknowledged that, on finding himself closely pursued, he had requested the unfortunate man to walk his horse for him while he turned aside upon a necessary occasion, and thus escaped. This species of forgery, however, is not confined to criminals. It sometimes happens that an innocent man, sensible that, though guiltless, appearances are against him, and not duly weighing the danger of being detected in clandestine attempts to stifle proof, endeavors to get rid of real evidence in such a way as to avert suspicion from himself, or even to turn it on some one else.
- 2. The forgery of real evidence may have been effected with the malicious purpose of bringing down suffering on an innocent individual. The most obvious instance is

where stolen goods are clandestinely deposited in the house, room, or box of an innocent person, with the view of exciting a suspicion of larceny against him; and a suspicion of murder may be raised by secreting a bloody weapon in the like manner.

It sometimes happens that real evidence is forged, with the double motive of self-exculpation and of inducing suspicion on a hated individual. And, lastly, it is to be observed, that this species of forgery may be accomplished by force as well as by fraud; e. g. three men unite in a conspiracy against an innocent person; one lays hold of his hands, another puts into his pocket an article of stolen property, which the third, running up as if by accident during the scuffle, finds there, and denounces him to justice as a thief.

- 3. Forgery of real evidence committed either in sport or with the view of effecting some moral end. As an instance of this may be cited the story of the patriarch Joseph, who, with a view of creating alarm and remorse in the minds of his guilty brothers for their conduct towards him in early life, caused a silver cup to be privately hid in one of their sacks, and, after they had gone some distance on their journey, had them arrested and brought back as thieves.
- III. The apparently oriminative fact may have been created by the accused, in the furtherance of some lawful, or even laudable design. This is best exemplified by those cases of larceny where stolen property is found in the possession of a person who, knowing or suspecting it to have been stolen, takes possession of it with the view of seeking the true owner in order to restore it, or of bringing the thief to justice; but, before this can be accomplished, becomes himself the object of suspicion, in consequence of the stolen property being seen in his possession, or of false information being laid against him.

Real evidence, while truly evidentiary of guilt in general, may be fallacious as to the quality of the crime. The recent possession of stolen property, for instance, standing alone, is deemed presumptive evidence of larceny, not of the accused having received the goods with a guilty knowledge of their having been stolen. And there can be little doubt that many persons have been convicted and punished for the former offence whose guilt consisted in the latter.

Possession by the accused of the whole or some portion of stolen property is not only presumptive evidence of delinquency when coupled with other circumstances; but, even when standing alone, it will in many cases raise a presumption of guilt, sufficient to cast on the accused the onus of showing that he came honestly by the stolen property; and in default of his so doing, it will warrant the jury in convicting him as the thief. In order, however, to put the accused on his defence, his possession of the stolen property must be recent; although what shall be deemed recent possession must be determined by the nature of the articles stolen.

The probability of guilt is increased by the coincidence in number of the articles stolen with those found in the possession of the accused, — the possession of one out of a large number stolen being more easily attributable to accident or forgery than the possession of all.

But in order to raise this presumption legitimately, the possession of the stolen property should be exclusive, as well as recent. If, for instance, the articles stolen were found on the person of the accused, or in a locked-up house or room, or in a box of which he kept the key, there would be fair ground for calling on him for his defence; but if they were found lying in a house or room in which he lived jointly with others equally capable with himself of having committed the theft, or in an open box to which others had access, this would raise no definite presumption of his guilt.

There can be no doubt that, in practice, the legitimate limits of the presumption under consideration are sometimes overstepped. It is in its character of a circumstance joined with others of a criminative nature, that the fact of possession becomes really valuable and entitled to consideration, whether it be ancient or recent, joint or exclusive.

### PART III.

#### DOCUMENTS.

#### CHAPTER I.

#### DOCUMENTARY EVIDENCE IN GENERAL.

The term Documents properly includes all material substances on which the thoughts of men are represented by writing, or any other species of conventional mark or symbol. Thus, the wooden scores on which bakers, milkmen, etc. indicate by notches the number of loaves of bread or quarts of milk supplied to their customers, the old exchequer tallies, and such like, are documents as much as the most elaborate deeds.

Documents, being inanimate things, necessarily come to the cognizance of tribunals through the medium of human testimony.

When documents which are wanted for evidence are in the possession of the opposite party, a notice to produce them should be served on him in due time before the trial; when, if he fails to produce them, derivative, or, as it is technically termed, "secondary" evidence, of their contents may be given. When they are in the possession of a third party, he should be served with what is called a subpœna duces tecum, i. e. a summons to attend the trial as a witness and bring the documents with him.

Although documentary evidence most usually presents itself in a written form, the terms "writing" and "written evidence" have obtained in law a secondary and limited signification, in which they are commonly, but not always used.

"Writings" are of two kinds, "public" and "private."
Under the former come acts of Parliament, judgments, and acts of

courts, both of voluntary and contentious jurisdiction, proclamations, public books, and the like. They are divided into "judicial" and "not judicial"; and also into "writings of record" and "writings not of record." Records are the memorials of the legislature, and of the King's courts of justice, and are authentic beyond all manner of contradiction. But the judgments of tribunals are not in general receivable in evidence against those who were neither party nor privy to them; although in some instances the law, from motives of policy, renders them conclusive and binding on all the world, as in the case of judgments in rem.

"Documents of a public nature, and of public authority, are generally admissible in evidence, although their authenticity be not confirmed by the usual and ordinary tests of truth, the obligation of an oath, and the power of cross-examining the parties on whose authority the truth of the document depends." This must not be understood to mean that the contents of public writings are admissible in evidence for every purpose: each public document is only receivable in proof of those matters the remembrance of which it was called into existence to perpetuate. Some public writings are like records, — conclusive on all the world: but this is not their general character; as, most usually, they only hold good until disproved.

Among private writings, the first and most important are those which come under the description of "deeds," i. e. "writings sealed and delivered." And they differ from inferior written instruments in this important particular, namely, that they are presumed to have been made on good consideration; and this presumption cannot be rebutted, unless the instrument is impeached for fraud; whereas in contracts not under seal a consideration must be alleged and proved. In former ages deeds were rarely signed, and the essence of that kind of instrument consisted, and indeed consists still, in the sealing and delivery.

Deeds are usually attested by witnesses; who subscribe their names, to signify that the deed has been executed in their presence. In modern practice the rule is that the execution of a deed must be proved by the testimony of at least one of the attesting witnesses. If they are all dead, or insane, or out of the juris-

diction of the court, or cannot be found on diligent inquiry, proof may be given of their handwriting; but the testimony of third parties, even though they might have been present at the execution of the instrument, is not receivable to prove it. They may, however, be received to contradict the testimony of the subscribing witnesses. But it was not necessary to call the attesting witness, or indeed to give any other proof of a deed thirty years old or upwards, and coming from an unsuspected repository; unless perhaps when there was an erasure or other blemish in some material part of it.

Instruments not under seal are sometimes attested by witnesses; and in such cases it is held that the attesting witness must be called, or his handwriting proved, as in the case of a deed.

Where there is no attesting witness the usual proof is by the handwriting of the party. (Part III. ch. 2.)

Wills. By the Statute of Frauds, 29 Car. II., c. 3, s. 5, it was enacted that all devises and bequests of lands or tenements, to be valid, should be in writing and signed by the party, or by some other person in his presence and by his express directions, and be attested and subscribed in his presence by at least three credible witnesses. Wills of personalty remained as at the common law, and did not require any witness.

Although documents are necessarily brought before the tribunal by means of verbal or parol evidence, that evidence must be limited to giving such a general description of the document as shall be sufficient to identify it, and deposing to the real evidence afforded by its visible state. Thus, a keeper of records may speak as to the condition in which they are, but not as to their contents. It is commonly said, that "Parol evidence is inferior (or secondary) to written"; that "Written evidence is superior to verbal," etc.; but these axioms must be understood with much allowance and qualification.

The maxims in question have three applications :-

1. In the case of records and other instruments, which the policy of the law requires to be in writing and executed with prescribed formalities, no derivative, and consequently no verbal or other parol evidence of their contents is receivable, until the absence of the original writing is accounted for; neither is parol or other extrinsic evidence receivable, at least in general, to contradict, vary, or explain them.

- 2. A like rule holds where writing or formalities are not required by law, but the parties have had recourse to them for the sake of greater solemnity and security; as where a man executes a bond to secure the payment of money, when an unattested writing would have been sufficient.
- 3. Where the contents of any document are in question, either as a fact directly in issue or a subalternate principal fact, the document is the proper evidence of its own contents. But where a written instrument or document of any description is not a fact in issue, and is merely used as evidence to prove some act, independent proof allunde is receivable. Thus, although a receipt has been given for the payment of money, proof of the fact of payment may be made by any person who witnessed it.

But although documentary evidence may not be receivable, for want of being verified on oath or its equivalent, or traceable to the party against whom it is offered, the benefit of its permanence is not always lost to justice. Thus, a witness who has drawn up a written narrative, or made a written memorandum of a matter or transaction, may in many cases use it while under examination, as a script to refresh his memory.

As connected with this subject may be noticed the maxim of law, "Nihil tam conveniens est naturali æquitati, unumquodque dissolvi eo ligamine quo ligatum est." "Quomodo quid constituitur," says one of our old books, "eodem modo dissolvitur; record per record, escript per escript, parliament per parliament, parol per parol." For instance, things that lie in grant, as they must be created by deed, cannot be surrendered without deed. But the performance of a condition in an instrument under seal may be proved by inferior evidence. Thus, payment of a bond may be proved by parol, etc.

"Parol," or, to speak more correctly, "extrinsic" evidence, is not in general receivable to contradict, vary

or explain written instruments. But there are many cases where the rejection of such proof would be the height of injustice:—

- 1. With respect to the varying or explaining of instruments there are two rules: "Ambiguitas verborum patens nulla verificatione excluditur"; "Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum, verificatione facti tollitur." "Ambiguitas patens is that which appears to be ambiguous upon the deed or instrument; latens is that which seemeth certain and without ambiguity, for anything that appeareth upon the deed or instrument; but there is some collateral matter out of the deed that breedeth the ambiguity."
- 2. There are some other exceptions to the rule rejecting intrinsic evidence to affect written instruments. Foremost among them come those cases where it is sought to impeach written instruments as having been obtained by duress, menace, fraud, covin, or collusion; which, as is well known, vitiate all acts, however solemn, or even judicial. But the party to an instrument is estopped from setting up his own fraud, etc. to avoid the instrument; as also are those claiming under him; and the like rule holds in the case of menace or duress.
- 3. Another exception is to be found in the admissibility of the evidence of usage in aid of the construction of written instruments. This evidence has been received for explaining or filling up terms used in commercial contracts, policies of insurance, negotiable instruments, and other writings of a similar kind, when the language, though well understood by the parties, and by all who have to act upon it in matters of business, would often appear to the common reader scarcely intelligible, and sometimes almost a foreign language. The terms used in these instruments are to be interpreted according to the recognized practice and usage with reference to which the parties are supposed to have acted; and the sense of the words, so interpreted, may be taken to be the appropriate and true sense intended by the parties.

Where the language of the contract itself manifests an intention to exclude the operation of usage, evidence of usage cannot be admitted. And in all cases in which this evidence is admitted, it must be presumed that the usage was known to the contracting parties, and that they contracted in reference to it, and in conformity with it.

But "the rule for admitting evidence of usage must be taken always with this qualification, that the evidence proposed is not repugnant to, or inconsistent with, the written contract. It ought never to be allowed to vary or contradict the written instrument, either expressly or by implication." And, lastly, where the incident sought to be annexed to a contract is of such a nature that the parties are not themselves competent to introduce it by express stipulation, such an incident cannot be annexed by the tacit stipulation arising from usage.

Imperfections or blemishes apparent on the face of a document, such as interlineations, erasures, etc., do not vitiate the document, unless they are in some material part of it. One of our old books lays down generally, that "an interlineation, without anything appearing against it, will be presumed to be at the time of the making of the deed, and not after." Other authorities seem disposed to extend this doctrine to erasures; and both positions have been confirmed by the Court of Queen's Bench. But that an erasure or alteration in a suspicious place must be explained by the party seeking to enforce the instrument, has been law from the earliest times.

#### CHAPTER II.

#### PROOF OF HANDWRITING.

The proof of handwriting in cases other than those where the fact that a certain document was written is proved by eyewitnesses, or by the admissions of parties, or is inferred from circumstances. A person who has ever seen the supposed writer of a document write, so as to have thereby acquired a standard in his own mind of the general character of the handwriting of that party, is a competent witness to say whether he believes the handwriting of the

disputed document to be genuine or not. The having seen the party write but once, no matter how long ago, or having seen him merely write his signature, or even only his surname, is sufficient to render the evidence admissible: the weakness of it is matter of comment for the jury.

"Knowledge of handwriting may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them, by written answers producing further correspondence, or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party, evidence of the identity of the party being of course added aliunde, if the witness be not personally acquainted with him." The number of papers, however, which the witness may have seen in the handwriting of the party is perfectly immaterial, so far as relates to the admissibility of the evidence. Nor is it absolutely necessary for this purpose that any act should be done or business transacted by the witness in consequence of the correspondence. "The clerk who constantly read the letters, the broker who was ever consulted upon them, is as competent to judge whether another signature is that of the writer of the letters, as the merchant to whom they were addressed."

It seems, however, that in order to render admissible either of the above modes of proof of handwriting, the knowledge must not have been acquired or communicated with a view to the specific occasion on which the proof is offered.

Under what circumstances is it competent to prove the handwriting of a party to a document, by a comparison or collation instituted between it and other documents proved or assumed to be in his handwriting? By the general rule of the common law, such evidence was not receivable. There are several common law exceptions to the rule which excludes proof of handwriting by comparison:—

- 1. It is competent for the court and jury to compare the handwriting of a disputed document with any others which are in evidence in the cause, and which are admitted or proved to be in the handwriting of the supposed writer.
- 2. Another exception is the case of ancient documents. When a document is of such a date that it cannot reasonably be expected to find living persons acquainted with the handwriting of the supposed writer, either by having seen him write, or by having held correspondence with him, the law, acting on the maxim, "Lex non cogit impossibilia," allows other ancient documents, which are proved to have been treated and regularly preserved as authentic, to be compared with the disputed one. It is not easy to determine the precise degree of antiquity which is sufficient to let in evidence of this nature. In Roe d. Brune v. Rawlings, the supposed writer had been dead about sixty years; in Doe d. Tilman v. Tarver, the writing was nearly one hundred years old; and in Doe d. Jenkins v. Davies it was eighty-four years old.

In order to disprove handwriting, evidence has frequently been adduced of persons who have made it their study, and who, though unacquainted with that of the supposed writer, undertake, from their general knowledge of the subject, to say whether a given piece of handwriting is in a feigned hand or not. Much difference of opinion has prevailed relative to the admissibility of this sort of evidence; but according to the present practice it is generally received without objection.

Whatever may be the relative values of the several modes of proving handwriting which have been discussed in this chapter, when compared with each other, it is certain that all such proof is even in its best form precarious, and often extremely dangerous.

<sup>&</sup>lt;sup>1</sup> 7 East, 282, note a.

<sup>2</sup> R. & M. 141.

<sup>8 10</sup> Q. B. 314.

# BOOK III.

# RULES REGULATING THE ADMISSIBILITY AND EFFECT OF EVIDENCE.

# PART I.

#### THE PRIMARY RULES OF EVIDENCE.

THE primary rules of evidence may all be ranged under three heads: —

- 1. To what subjects evidence should be directed.
- 2. The burden of proof, or onus probandi.
- 3. How much must be proved.

#### CHAPTER I.

TO WHAT SUBJECTS EVIDENCE SHOULD BE DIRECTED.

Of all rules of evidence, the most universal and the most obvious is this,—that the evidence adduced should be alike directed and confined to the matters which are in dispute, or which form the subject of investigation.

Evidence may be rejected as irrelevant for one of two reasons. 1st. That the connection between the principal and evidentiary facts is too remote and conjectural. 2d. That it is excluded by the state of the pleadings, or what is analogous to the pleadings; or is rendered superfluous by the admissions of the party against whom it is offered. The use of pleadings, or of some analogous statement of the cases of the contending parties, is to enable the tribunal to see

the points in dispute, and the parties to know beforehand what they should come prepared to attack or defend: consequently, although a piece of evidence tendered might, if merely considered per se, establish a legal complaint, accusation, or defence; yet, as the opposite party has had no intimation beforehand that that ground of complaint, etc. would be insisted on, the adducing evidence of it against him would be taking him by surprise and at a disadvantage.

There are certain matters which it is unnecessary to prove, i. e.: 1. Matters noticed by the courts ex officio.

2. Matters deemed notorious.

- 1. An enumeration of the matters which the courts, in obedience to common or statute law, notice ex officio, would here be out of place. Suffice it to say, generally, that, besides noticing the ordinary course of nature, seasons, times, etc., the courts notice without proof various political, judicial, and social matters. Thus they notice the political constitution of our own government; the territorial extent of the jurisdiction and sovereignty exercised de facto by it; the existence and titles of other sovereign powers; the jurisdiction of the superior courts, and courts of general jurisdiction; the seals of the superior courts. and of many others: the custom or law of the road, that horses and carriages shall respectively keep on the left side, etc. In all cases of this kind, where the memory of a judge is at fault, he resorts to such documents or other means of reference as may be at hand, and he may deem worthy of confidence. Thus, if the point at issue be a date, the judge will refer to an almanac.
- 2. The law of England is very slow in recognizing matters as too notorious to require proof, and it is not easy to lay down a definite rule respecting them. The language of Wilde, C. J., in the case of Ernest Jones, who was indicted for making a seditious speech at a public meeting, seems to throw some light on this subject. The Lord Chief Justice there told the jury, that they should take into consideration what they knew of the state of the country, and of society generally, at the time when the language was used. What might be innoxious at one time, when there was a general feeling of contentment, might be very danger-

<sup>1</sup> Centr. Cr. Court, 1841, MS.

ous at another time, when a different feeling prevailed. But that they could not, without proof of them, take into their consideration particular facts attending the particular meeting at which the words were spoken.

The rejection of evidence on the ground of remoteness, or want of reasonable connection between the principal and evidentiary facts, is a branch of that fundamental principal of our law which requires the best evidence to be adduced. The rule has no application where the evidence tendered is either direct, or, though circumstantial, is necessarily conclusive upon the issue. But whether a given piece of presumptive evidence is receivable, or ought to be rejected on this ground, is not unfrequently a question of considerable difficulty. On a question between landlord and tenant, as to the terms on which the premises were held, although it might assist to know the terms on which the landlord usually let to his other tenants, not connected with the tenant whose case is under consideration, the evidence would be rejected as too remote.

But acts unconnected with the act in question are frequently receivable to prove psychological facts, such as intent. Thus, on an indictment for uttering a forged banknote, evidence is admissible that the accused has uttered similar forged notes, etc. On an indictment for poisoning one person, evidence is admissible that the accused has previously or subsequently poisoned other persons.

Admissibility of evidence to character. According to the general rule, it is not competent to give evidence of the general character of the parties to forensic proceedings, much less of particular facts not in issue in the cause, with the view of raising a presumption either favorable to one party or disadvantageous to his antagonist.

But where the very nature of the proceedings is such as to put in issue the character of any of the parties to them, a different rule necessarily prevails; and it is not only competent to give general evidence of the character of the party with reference to the issue raised, but even to inquire into particular facts tending to establish it. Thus, on an indictment for keeping a common bawdy-house, or common gaming-house, the

prosecutor may give in evidence any acts of the defendant which support the general charge. So, where the issue is whether a party is non compos mentis, proof may be adduced of particular acts of insanity. In actions for seduction, the character of the female for chastity is directly in issue, and may be impeached either by general evidence of misconduct, or proof of particular acts of it.

Although, in criminal prosecutions in general, the character of the accused is not in the first instance put in issue, still in all cases where the direct object of the proceedings is to punish the offence, — such as indictments for treason, felony, or misdemeanor, — and is not merely the recovery of a penalty, it is competent to him to defend himself by proof of previous good character, reference being had to the nature of the charge against him.

The inquiry in such cases should be as to his general character among those who have known him. And even the individual opinion of a witness, founded on his own personal experience of the disposition of the accused, is inadmissible.

Whenever it is allowable to impeach the character of a party, it is competent to the other side to give evidence to contradict the evidence adduced. And although, in a criminal prosecution, evidence cannot in the first instance be given to show that the accused has borne a bad character, still, if he sets up his character as an answer to the charge against him, he puts it in issue, and the prosecutor may encounter his evidence either by cross-examination or contrary testimony. But, as it is not competent for the accused to show particular acts of good conduct, the prosecutor cannot, in general, go into particular cases of misconduct.

The credibility of a witness is always in issue; and accordingly general evidence is receivable, to show that the character which he bears is such that he is unworthy to be believed, even when upon his oath. But evidence of particular facts, or particular transactions, cannot be received for this purpose. The witness may indeed be questioned as to such facts or transactions; but he is not always bound to answer; and if he does, the party questioning is bound to take his answer, and cannot call evidence to contradict it.

In determining the relevancy of evidence to the matters in dispute in a cause, it is of the utmost importance to remember, that the question is whether the evidence offered is relevant to any of them. 1. Evidence not admissible to prove some of the issues or matters in question, may be admissible to prove others. 2. Evidence not admissible in the first instance may become so by matter subsequent. 3. Evidence may be admissible to prove a subordinate principal fact, which might not be admissible to prove the immediate fact in issue. This is of course subject to the rule requiring the best evidence.

#### CHAPTER II.

#### THE BURDEN OF PROOF.

Every controversy ultimately resolves itself into this. that certain facts or propositions are asserted by one of the disputant parties, which are denied, or at least not admitted, by the other. Now, where there are no antecedent grounds for supposing that what is asserted by the one party is more probable than what is denied by the other, and the means of proof are equally accessible to both, the party who asserts the fact or proposition must prove his assertion. — the burden of proof, or onus probandi, lies upon him; and the party who denies that fact or proposition need not give any reason or evidence to show the contrary, until his adversary has at least laid some probable grounds for the belief of it. The man who brings another before a judicial tribunal must rely on the strength of his own right and the clearness of his own proof, and not on the want of right or the weakness of proof in his adversary. The plaintiff is bound in the first instance to show at least a prima facie case, and if he leaves it imperfect the court will not assist him. When, however, the defendant, or either litigant party, instead of denying what is alleged against him, relies on some new matter, which, if true, is an answer to it, the burden of proof changes sides; and he in his turn is bound to show a prima facie case at least, and if

he leaves it imperfect the court will not assist him. And although the burden of proof must, in the first instance, be determined by the issues as they appear on the pleadings, or whatever according to the practice of the court and nature of the case is analogous to pleadings, it may, and frequently does, shift in the course of a trial.

In order to determine on which of two litigant parties the burden of proof lies, the following test has been suggested by Alderson, B., viz.: "Which party would be successful if no evidence at all were given?" As, however, the question of the burden of proof may present itself at any moment during a trial, the test ought in strict accuracy to be expressed thus, viz.: "Which party would be successful, if no evidence at all, or no more evidence, as the case may be, were given?"

1. The general rule is, that the burden of proof lies on the party who asserts the affirmative of the issue, or question in dispute.

It has been rashly inferred, and is frequently asserted, that "a negative is incapable of proof,"—a position wholly indefensible if understood in an unqualified sense. But when the negative ceases to be a simple one,—when it is qualified by time, place, or circumstance,—proof of a negative may very reasonably be required, when the qualifying circumstances are the direct matter in issue, or the affirmative is either probable in itself, or supported by a presumption, or peculiar means of proof are in the hands of the party asserting the negative.

But here two things must be particularly attended to: first, not to confound negative averments, or allegations in the negative, with traverses of affirmative allegations; and, secondly, to remember that the affirmative and negative of the issue mean the affirmative and negative of the issue in substance, and not merely its affirmative and negative in form. With respect to the former, if a party asserts affirmatively, and it thereby becomes necessary to his case to prove that a certain state of facts does not exist, or that a particular thing is insufficient for a particular purpose, and such like, — these, although they resemble negatives, are

not negatives in reality, — they are, in truth, positive averments, and the party who makes them is bound to prove them.

Again, the incumbency of proof is determined by the affirmative in substance, not the affirmative in form. Thus, in an action of covenant on a demise, whereby the defendant covenanted to repair and paint a house, the plaintiff alleged as breaches, that the defendant did not repair or paint the house, and the defendant pleaded that he did. On these pleadings, it was held that the plaintiff had the right to begin, as the burden of proof lay on him.

- 2. The burden of proof is shifted by those presumptions of law which are rebuttable; by presumptions of fact of the stronger kind; and by every species of evidence strong enough to establish a prima facie case against a party. When a presumption is in favor of the party who asserts the negative, it only affords an additional reason for casting the burden of proof on his adversary; it is when a presumption is in favor of the party who asserts the affirmative that its effect becomes visible, as the opposite side is then bound to prove his negative.
- 3. A third circumstance may affect the burden of proof, namely, the capacity of parties to give evidence. "The law will not force a man to show a thing which by intendment of law lies not within his knowledge." It is a general rule of evidence, that the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his own knowledge, or of which he is supposed to be cognizant.
- 4. This rule is of very general application: it holds good whether the proof of the issue involves the proof of an affirmative or of a negative, and has even been allowed to prevail against presumptions of law. But the authorities are by no means agreed as to the extent to which it ought to be carried.

#### CHAPTER III.

#### HOW MUCH MUST BE PROVED.

It is sufficient if the issues raised are proved in substance.

All averments which might be expunged from the record, without affecting the validity of the pleading in which they appear, may be disregarded at the trial; for such averments only encumber the record, and the proof of them would be as irrelevant as themselves.

But matter which need not have been stated may be injurious, or even fatal, when it affects that which is material. A party may allege or prove things which he was not bound to allege or prove, but which, when alleged or proved, put his case out of court. Averments, though unnecessarily introduced, cannot be rejected when they operate by way of description or limitation of essentials.

This rule does not merely absolve from proof of irrelevant matter. It has a far more general application; and means that the tribunal by which a cause is tried should examine the record or allegations of the contending parties, or of their advocates, as the case may be, with a legal eye, in order to ascertain the real question raised between them. Thus, although in actions on contracts the contract must be correctly stated, and proved as laid; yet in actions on simple contract, as also in actions of tort, the plaintiff may recover for a less sum than that claimed in the declaration. And in actions of tort it is, generally, sufficient to prove a substantial portion of the trespasses or grievances complained of.

The rule in question is not confined to civil cases. It is a principle running through the whole criminal law, that it is sufficient to prove so much of an indictment as charges the accused with a substantive crime.

But although the law is thus liberal in looking through mere form, in order to see the real substance of the questions raised, a

positive variance or discrepancy between a pleading and the proof adduced in support of it is fatal,—a rule considered necessary to prevent the opposite party from being unfairly taken by surprise, and the whole system of pleading converted into a snare. [The student should here consult the statutes concerning amendments.]

#### PART II.

#### THE SECONDARY RULES OF EVIDENCE.

The secondary rules of evidence are those rules which relate to the modus probandi, or mode of proving the matters that require proof. The fundamental principle of the common law on this subject is, that the best evidence must be given,—a maxim the general meaning of which has been explained in a former part of this work. In certain cases, however, peculiar forms of proof are either prescribed or authorized by statute. The whole matter may be treated in the following order:—

- 1. Direct and Circumstantial Evidence.
- Presumptive Evidence, Presumptions, and Fictions of Law.
- 3. Primary and Secondary Evidence.
- 4. Derivative Evidence in general.
- 5. Evidence supplied by the Acts of Third Parties.
- 6. Opinion Evidence.
- 7. Self-regarding Evidence.
- 8. Evidence rejected on Grounds of Public Policy.
- 9. Authority of Res Judicata.
- 10. Quantity of Evidence required.

#### CHAPTER I.

#### DIRECT AND CIRCUMSTANTIAL EVIDENCE.

ALL judicial evidence is either direct or circumstantial. "direct evidence" is meant when the principal fact, or factum probandum, is attested directly by witnesses, things, or documents. To all other forms the term "circumstantial evidence" is applied; which may be defined, that modification of indirect evidence, whether by witnesses, things, or documents, which the law deems sufficiently proximate to a principal fact, or factum probandum, to be receivable as evidentiary of it. And this also is of two kinds, conclusive and presumptive : "conclusive." when the connection between the principal and evidentiary facts the factum probandum and factum probans - is a necessary consequence of the laws of nature; as where a party accused of a crime shows that, at the moment of its commission, he was at another place, &c.: "presumptive," when the inference of the principal fact from the evidentiary is only probable, whatever be the degree of persuasion which it may generate.

As regards admissibility, direct and circumstantial evidence stand, generally speaking, on the same footing. It might at first sight be imagined that the latter, especially when in a presumptive shape, is inferior or secondary to the former, and that, by analogy to the principle which excludes second-hand and postpones secondary evidence, it ought to be rejected, at least when direct evidence can be procured. The law is, however, otherwise. Circumstantial evidence, whether conclusive or presumptive, is as original in its nature as direct evidence: both are distinct modes of proof, acting as it were in parallel lines, wholly independent of each other. Still, the non-production of direct evidence which it is in the power of a party to produce is matter of observation to a jury, as indeed is the suppression of any sort of proof.

Direct and presumptive evidence (using the words in their technical sense) being, as has been shown, distinct modes of proof, have each their peculiar advantages and characteristic dangers. Abstractly speaking, presumptive evidence is inferior to direct evidence, seeing that it is in truth only a substitute for it, and an indirect mode of proving that which otherwise might not be provable at all. Hence, a given portion of credible direct evidence must ever be superior to an equal portion of credible presumptive evidence of the same fact. But in practice it is from the nature of things impossible, except in a few rare and peculiar cases, to obtain more than a very limited portion of direct evidence as to any fact, especially any fact of a criminal kind; and with the probative force of such a limited portion of direct evidence, that of a chain of evidentiary facts, forming a body of presumptive proof, may well bear comparison.

#### CHAPTER II.

PRESUMPTIVE EVIDENCE, PRESUMPTIONS, AND FICTIONS OF LAW.

The elements, or links which compose a chain of presumptive proof, are certain moral and physical coincidences, which individually indicate the principal fact; and the probative force of the whole depends on the number, weight, independence, and consistency of those elementary circumstances.

A number of circumstances, each individually very slight, may so tally with and confirm each other as to leave no room for doubt of the fact which they tend to establish. Thus, on an indictment for uttering a bank-note knowing it to be counterfeit, proof that the accused uttered a counterfeit note amounts to nothing or next to nothing, — any person might innocently have a counterfeit note in his possession, and offer it in payment. But suppose further proof to be adduced that, shortly before the transaction in question, he had in another place, and to another person, offered in payment

another counterfeit note of the same manufacture, the presumption of guilty knowledge becomes strong.

It is, however, of the utmost importance to bear in mind, first, that, if all the circumstances proved arise from one source, they are not independent of each other; and that an increase in the number of the circumstances will not in such a case increase the probability of the hypothesis: secondly, that, where a number of independent circumstances point to the same conclusion, the probability of the justness of that conclusion is, not the sum of the simple probabilities of those circumstances, but the compound result of them: and lastly, that, the circumstances composing the chain must all be consistent with each other.

The term "presumption," in its largest and most comprehensive signification, may be defined to be an inference, affirmative or disaffirmative of the truth or falsehood of a doubtful fact or proposition, drawn by a process of probable reasoning, from something proved or taken for granted. It is, however, rarely employed in jurisprudence in this extended sense. Like "presumptive evidence," it has there obtained a restricted legal signification; and is used to designate an inference, affirmative or disaffirmative of the existence of some fact, drawn by a judicial tribunal, by a process of probable reasoning from some matter of fact, either judicially noticed, or admitted, or established by legal evidence to the satisfaction of the tribunal.

But the English term "Presumption" has been used by jurists and lawyers in several different senses: 1. The original or primary sense above stated. 2. The strict legal sense, there explained. 3. A generic term including every sort of rebuttable presumption; i. e. rebuttable presumptions of law, strong presumptions of fact, mixed presumptions, or masses of evidence, direct or presumptive, which shift the burden of proof to the opposite party. 4. A generic term applicable to certain, as well as to contingent inferences. 5. On the other hand, the word presumption has even been restricted to the sense of irrebuttable presumption.

6. The popular sense of presumptuousness, arrogance, blind adventurous confidence, or unwarrantable assumption. 7. The Latin "præsumptio" had, at one time at least, another signification. In the Leges Hen. I., c. 10, § 1, we find the expression "Præsumptio terre vel pecunie regis"; where "præsumptio" is used in the sense of "invasio," "intrusio," or "usurpatio."

#### SECTION I.

Presumptive Evidence, Presumptions generally, and Fictions of Law.

PRESUMPTIVE evidence, and the presumptions to which it gives rise, are not indebted for their probative force to positive law. When inferring the existence of a fact from others, courts of justice do nothing more than apply, under the sanction of law, a process of reasoning which the mind of any intelligent being would, under similar circumstances, have applied for itself: and the force of which rests altogether on experience and observation of the course of nature, the constitution of the human mind, the springs of human action, and the usages and habits of society. All such inferences are called by our lawyers "presumptions of fact," or "natural presumptions," in order to distinguish them from others of a technical kind, more or less of which are to be found in every system of jurisprudence, and which are known by the name of "presumptions of law." To these two classes may be added a third, which, as partaking in some degree of the nature of each of the former, may be called "mixed presumptions," or "presumptions of mixed law and fact." And - as presumptions of fact are both unlimited in number, and from their very nature are not so strictly the object of legal science as presumptions of law - we purpose to deal with the latter first, together with the kindred subject of fic-We shall then treat of the former, together with tions of law. mixed presumptions; and the present section will conclude with a notice of conflicting presumptions.

#### Subsection I.

# Presumptions of Law, and Fictions of Law.

Presumptions, or, as they are also called, "intendments" of law, are inferences or positions established by law, common or statute. They differ from presumptions of fact and mixed presumptions in two most important respects. First, that in the latter a discretion, more or less extensive, as to drawing the inference, is vested in the tribunal; while in those now under consideration the law peremptorily requires a certain inference to be made, whenever the facts appear which it assumes as the basis of that inference. Second, as presumptions of law are, in reality, rules of law, and part of the law itself, the court may draw the inference whenever the requisite facts are before it; while other presumptions, however obvious, being inferences of fact, could not, at common law, be made without the intervention of a jury.

The grounds of these præsumptiones juris are various. Some of them are natural presumptions, which the law simply recognizes and enforces, such as the legal maxim that every one must be presumed to intend the natural consequence of his own act. But in most of the presumptions which we are now considering, the inference is only partially approved by reason, - the law, from motives of policy, attaching to the facts which give rise to it an artificial effect beyond their natural tendency to produce belief. Thus, although a receipt for money under hand and seal naturally gives rise to a presumption of payment, still it does not necessarily prove it: and the conclusive effect of such a receipt is a creature of the law. To these may be added a third class, in which the principle of legal expediency is carried so far as to establish inferences not perceptible to reason at all, and perhaps even repugnant to it. Thus, when the law punishes offences, even mala prohibita, on the assumption that all persons in the kingdom, whether natives or foreigners, are acquainted with the common and general statute law, it manifestly assumes that which has no real existence whatever, though the arbitrary inference may be dictated by the soundest policy.

Of presumptions of law, some are absolute and conclusive, called by the common lawyers irrebuttable presumptions, and by the civilians præsumptiones juris et de jure; while others are conditional, inconclusive, or rebuttable, and are called by the civilians præsumptiones juris tantum, or simply præsumptiones juris. The former kind are inferences which the law makes so peremptorily that it will not allow them to be overturned by any contrary proof, however strong. Thus, a bond or other specialty is presumed to have been executed for good consideration, and no proof can be admitted to the contrary, unless the instrument is impeached for fraud.

"Fictions of law" are closely allied to irrebuttable presumptions of law; in other words, fictions of law are where the law, for the advancement of justice, assumes as fact, and will not allow to be disproved, something which is false, but not impossible. The difference between fictions of law and presumptiones juris et de jure consists in this, that the latter are arbitrary inferences, which may or may not be true; while in the case of fictions the falsehood of the fact assumed is understood and avowed.

Fictions of law, as is justly observed by Mr. Justice Blackstone, though they may startle at first, will be found on consideration to be highly beneficial and useful.

Fictions are only to be made for necessity, and to avoid mischief, and consequently they must never be allowed to work prejudice or injury to an innocent party.

The matter assumed as true must be something physically possible.

Fictions of law are of three kinds: affirmative or positive fictions, negative fictions, and fictions of relation.

In the case of affirmative fictions, something is assumed to exist which in reality does not; such as the fiction of lease, entry, and ouster, in actions of ejectment.

In negative fictions, on the contrary, that which really exists is treated as if it did not.

Fictions of relation are of four kinds:—First, where the act of one person is taken to be the act of another; as where the act or possession of a servant is deemed the act or possession of his master. Second, where an act done by or to one thing is taken, by relation,

as done by or to another; as where the possession of land is transferred by livery of seisin, or a mortgage of land is created by delivery of the title deeds. Third, fictions as to place; as in the case of a contract made at sea, or abroad, being treated as if made in England, and the like. Fourth, fictions as to time. It is on this principle that the title of an executor or administrator to the goods of the testator or intestate relates back to the time of his death, and does not take effect merely from the probate, or grant of the letters of administration.

The other kind of presumptions of law, called rebuttable presumptions, or præsumptiones juris tantum, has been thus correctly defined: "Præsumptio juris dicitur, quæ ex legibus introducta est, ac pro veritate habetur, donec probatione aut præsumptione contraria fortiore enervata fuerit." First, like the former class, these presumptions are intendments made by law; but, unlike them, they only hold good until disproved. Thus, the legitimacy of a child born during wedlock may be rebutted by proof of the absence of the opportunity for sexual intercourse between its supposed parents. To this class also belong the well-known presumptions in favor of innocence and sanity, and against fraud. This species of presumptions may be rebutted by presumptive as well as by direct evidence, and the weaker presumption will give place to the stronger.

#### SUBSECTION II.

# Presumptions of Fact, and Mixed Presumptions.

I. The grounds or sources of presumptions of fact are obviously innumerable; they are coextensive with the facts, both physical and psychological, which may, under any circumstances whatever, become evidentiary in courts of justice; but, in a general view, such presumptions may be said to relate to things, persons, and the acts and thoughts of intelligent agents. With respect to the first of these, it is an established principle that conformity with the ordinary course of nature ought always to be presumed. Thus, the order and changes of the seasons, the rising, setting, and course of the heavenly bodies, and the

known properties of matter, give rise to very important presumptions relative to physical facts, or things. The same rule extends to persons. Thus, the absence of those natural qualities. powers, and faculties which are incident to the human race in general will never be presumed in any individual: such as the impossibility of living long without food, the power of procreation within the usual ages, the possession of the reasoning faculties, the common and ordinary understanding of man, etc. To this head are reducible the presumptions which juries are sometimes called on to make, relative to the duration of human life, the time of gestation. Under the third class, namely, the acts and thoughts of intelligent agents, come, among others, all psychological facts; and here most important inferences are drawn from the ordinary conduct of mankind, and the natural feelings or impulses of human nature. Thus, no man will ever be presumed to throw away his property, as, for instance, by paying money not due; and so it is a maxim, that every one must be taken to love his own offspring more than that of another person. Many presumptions of this kind are founded on the customs and habits of society; as, for instance, that a man to whom several sums of money are owing by another will first call in the debt of longest standing.

II. With respect to their degree of probative force, presumptions are, according to Lord Coke, of three sorts, viz.: "violent, probable, and light or temerary. Violenta præsumptio is many times plena probatio; præsumptio probabilis moveth little; but præsumptio levis seu temeraria moveth not at all." "Præsumptio violenta valet in lege."

The utility of the classification of presumptions of fact into violent, probable, and light is questionable; but if it be thought desirable to retain it, the following good illustration is added from a well-known work on criminal law: "Upon an indictment for stealing in a dwelling-house, if the defendant were apprehended a few yards from the outer door, with the stolen goods in his possession, it would be a violent presumption of his having stolen them; but if they were found in his lodgings some time after the larceny, and he refused to account for his possession of them, this, together with proof that they were actually stolen, would amount, not to a violent, but to a probable presumption merely; but if the property were not

found recently after the loss, as, for instance, not until sixteen months after, it would be but a light or rash presumption, and entitled to no weight."

A division of presumptions of fact, more accurate in principle and more useful in practice, is obtained by considering them with reference to their effect on the burden of proof, or onus probandi. Præsumptiones hominis, or presumptions of fact, are divided into slight and strong, according as they are or are not of sufficient weight to shift the burden of proof.

Slight presumptions, although sufficient to excite suspicion, or to produce an impression in favor of the truth of the facts they indicate, do not, when taken singly, either constitute proof or shift the burden of proof. Thus, the fact of stolen property being found in the possession of the supposed criminal, a long time after the theft, though well calculated to excite suspicion against him, is, when standing alone, insufficient even to put him on his defence.

But although presumptions of this kind are of no weight when standing alone, still they not only form important links in a chain of evidence, and frequently render complete a body of proof which would otherwise be imperfect, but the concurrence of a large number of them may, each contributing its individual share of probability, not only shift the *onus probandi*, but amount to proof of the most convincing kind.

Strong presumptions of fact, on the contrary, shift the burden of proof, even though the evidence to rebut them involved the proof of a negative. The evidentiary fact giving rise to such a presumption is said to be "prima facie evidence" of the principal fact of which it is evidentiary. Thus, possession is prima facie evidence of property; and the recent possession of stolen goods is sufficient to call on the accused to show how he came by them, and, in the event of his not doing so satisfactorily, to justify the conclusion that he is the thief who stole them.

Presumptions of this nature are entitled to great weight, and, when there is no other evidence, are generally decisive in civil cases. In criminal, and more especially in capital cases, a greater degree of caution is, of course,

requisite, and the technical rules regulating the burden of proof are not always strictly adhered to.

The resemblance between inconclusive presumptions of law, and strong presumptions of fact, cannot have escaped notice,—the effect of each being to assume something as true until it is rebutted; and, indeed, in the Roman law, and in other systems where the decision of both law and fact is intrusted to a single judge, the distinction between them becomes in practice almost imperceptible. But it must never be lost sight of in the common law, where the functions of judge and jury are usually kept distinct.

"Mixed presumptions," or, as they are sometimes called, "presumptions of mixed law and fact," and "presumptions of fact recognized by law," hold a place somewhere between the two foregoing; and consist chiefly of certain presumptive inferences which, from their strength, importance, or frequent occurrence, attract as it were the observation of the law: and, from being constantly recommended by judges and acted on by juries, become in time as familiar to the courts as presumptions of law, and occupy nearly as important a place in the administration of justice. Some also have been either introduced or recognized by statute. They are in truth a sort of quasi præsumptiones juris; and, like strict legal presumptions, may be divided into three classes: 1st. Where the inference is one which common sense would have made for itself: 2d. Where an artificial weight is attached to the evidentiary facts, beyond their mere natural tendency to produce belief; and, 3d. Where from motives of legal policy juries are recommended to draw inferences which are purely artificial. The last two classes are chiefly found where long-established rights are in danger of being defeated by technical objections, or by want of proof of what has taken place a great while ago; in which cases it is every day's practice for judges to advise juries to presume, without proof, the most solemn instruments, such as charters, grants, and other public documents, as likewise all sorts of private conveyances.

Artificial presumptions of this kind require to be made with caution, and it must be acknowledged that the legitimate limits of the practice have often been greatly overstepped.

The terms in which presumptions of fact and mixed presumptions should be brought under the consideration of juries by the court, depend on their weight, either natural or technical. When the presumption is one which the policy of law and the ends of justice require to be made, the jury should be told that they ought to make the presumption, unless evidence is given to the contrary; it should not be left to them as a matter for their discretion. In the case of presumptions of a less stringent nature, however, such a direction would be improper; and perhaps the best general rule is, that the jury should be advised or recommended to make the presumption.

A characteristic distinction between presumptions of law and presumptions of fact, either simple or mixed, that, when the former are disregarded by a jury, a new trial is granted as matter of right, but the disregard of any of the latter, however strong and obvious, is only ground for a new trial at the discretion of the court. Now, although questions of fact are the peculiar province of a jury, the courts, by virtue of their general controlling power over everything that relates to the administration of justice, will usually grant a new trial when an important presumption of fact, or an important mixed presumption, has been disregarded by a jury. But new trials will not always be granted when successive juries disregard such a presumption; and the interference of the court in this respect depends very much on circumstances. As a general rule, it may be stated, that not more than one or two new trials would be granted.

#### Subsection III.

# Conflicting Presumptions.

Rebuttable presumptions of any kind may be encountered by presumptive, as well as by direct evidence; and the court may even take judicial notice of a fact—such, for example, as the increase in the value of money—for the purpose of rebutting a presumption which would otherwise have arisen from uninterrupted modern usage. The relative weight of conflicting presumptions of law is to be determined

by the court or judge. - who should also direct the attention of the jury to the burden of proof as affected by the pleadings, and to the evidence in each case. And although the decision of questions of fact constitutes the peculiar province of the jury, they ought, especially in civil cases, to be guided by those rules regulating the burden of proof and the weight of conflicting presumptions. which are recognized by law, and have their origin in natural equity and convenience. It must not, however, be supposed that every præsumptio juris is, ex vi termini, stronger than every præsumptio hominis, or præsumptio mixta : on the contrary, which of any two presumptions ought to take precedence must be determined by the nature of each. The presumption of innocence, for instance, is præsumptio juris; but every day's practice shows that it may be successfully encountered by the presumption of guilt arising from the recent possession of stolen property. - which is at most only præsumptio mixta.

The following rules, provided they are understood as being merely rules for general guidance, and not rules of universal obligation, are likely to be serviceable in practice.

- I. Special presumptions take precedence of general. This is the chief rule.
- II. Presumptions derived from the course of nature are stronger than casual presumptions. This is a very important rule, derived from the constancy and uniformity observable in the works of nature, which render it probable that human testimonies, or particular circumstances which point to a conclusion at variance with its laws, are, in the particular instance, fallacious.
- III. Presumptions are favored which give validity to acts.
- IV. The presumption of innocence is favored in law. This is a well-known rule, and runs through the whole criminal law; but it likewise holds in civil proceedings.

## SECTION II.

Presumptions of Law and Fact usually met in Practice.

#### Subsection I.

Presumption against Ignorance of the Law.

The law presumes conclusively against ignorance of its provisions. It is a præsumptio juris et de jure, that all persons, even foreigners, subject to any law which has been duly promulgated, or which derives its efficacy from general or immemorial custom, must be supposed to be acquainted with its provisions, so far as to render them amenable to punishment for their violation, and to have done all acts with a knowledge of their legal effects and consequences. "Ignorantia juris, quod quisque tenetur scire. non excusat."

Courts of justice are also presumed to know the law, but in a different sense. Private individuals are only taken to know it sufficiently for their personal guidance; but tribunals are to be deemed acquainted with it, so as to be able to administer justice when called on: for which reason it is not necessary, in pleading, to state matter of law.

The sovereign is also presumed to be acquainted with the law, — "Præsumitur rex habere omnia jura in scrinio pectoris sui": still it is competent, in certain cases, to show that grants from the Crown have been made under a mistake of the law.

#### SUBSECTION II.

Presumptions derived from the Course of Nature.

Presumptions derived from the course of nature are in general entitled to more weight than such presumptions as arise casually, and they may be divided into physical and moral. As instances of the first, the law notices the course of the heavenly bodies, the changes of the seasons, and other physical

phenomena. So the law presumes all individuals to be possessed of the usual powers and faculties of the human race; such as common understanding, the power of procreation within the usual ages, etc.

Under this head come the important and difficult questions of the maximum and minimum term of gestation of the human fœtus. These are medico-legal subjects, on which, where we are not tied up by any positive rule of law, the opinions of physiologists and physicians must necessarily have great weight.<sup>1</sup>

Presumptions of this kind, derived from observation of the moral world. Many of these are founded on the feelings and emotions natural to the human heart, of which we have already seen an instance in the celebrated judgment of Solomon. Thus, it is held that money advanced by a parent to his child is intended as a gift, not as a loan, etc.

It is also a maxim running through the whole law, that every person must be taken to intend the natural consequences of his acts. The principal applications of this maxim are to be found in criminal cases.

#### SUBSECTION III.

## Presumptions against Misconduct.

• 1. It is a præsumptio juris, running through the whole law of England, that no person shall, in the absence of criminative proof, be supposed to have committed any violation of the criminal law,—whether malum in se or malum prohibitum,—or to have done any act subjecting him to any species of punishment, such, for instance, as a contempt of court; or involving a penalty, such as loss of dower, etc. And this presumption is not confined to proceedings instituted for the purpose of punishing the supposed offence, or of dealing with the supposed conduct; but it holds in all proceedings, for whatever purpose originated, and whether the guilt of the party comes in question

<sup>&</sup>lt;sup>1</sup> See Ewell's Medical Jurisprudence, p. 190, as to the maximum and minimum terms of gestation.

directly or collaterally. It is therefore a settled rule in criminal cases, that the accused must be presumed to be innocent until proved to be guilty; and consequently, that the onus of proving everything essential to the establishment of the charge against him lies on the prosecutor. It is, however, in general sufficient to prove a prima facie case.

It is a branch of this rule, that ambiguous instruments or acts shall, if possible, be construed so as to have a lawful meaning.

- 2. All persons are presumed to have duly discharged any obligation imposed on them either by unwritten or written law. Thus, the judgment of courts of competent jurisdiction are presumed to be well founded, and their records to be correctly made; judges and jurors are presumed to do nothing causelessly or maliciously.
- 3. It is a principle of law nearly, if not altogether, as universal as the former, that "Odiosa et inhonesta non sunt in lege præsumenda." In furtherance of this, it is a maxim that fraud and covin are never presumed, even in third parties whose conduct only comes in question collaterally. So, the law presumes against vice and immorality; and, on this ground, presumes strongly in favor of marriage.

One of the strongest illustrations of this principle (although resting also in some degree on grounds of public policy) is the presumption in favor of the legitimacy of children.

- 4. Wrongful or tortious conduct will not be presumed. Thus, no species of ouster, such as disseisin, discontinuance, etc., will be presumed without proof, either direct or presumptive.
- 5. Want of religious belief, or irreligious conduct, will not be presumed. "All the members of a Christian community being presumed to entertain the common faith, no man is supposed to disbelieve the existence and moral government of God."
- 6. All testimony given in a court of justice is presumed to be true until the contrary appears.

#### SUBSECTION IV.

Presumptions in Favor of the Validity of Acts.

The important maxims, "Omnia præsumuntur rite esse acta." "Omnia præsumuntur solenniter esse acta," "Omnia præsumuntur legitime facta, donec probetur in contrarium." etc., must not be understood as of universal application. The extent to which presumptions will be made in support of acts depends very much on whether they are favored or not by law, and also on the nature of the fact required to be presumed. The true principle intended to be conveyed by the rule, "Omnia præsumuntur rite esse acta," and the other expressions just quoted, seems to be, that there is a general disposition in courts of justice to uphold official, judicial, and other acts, rather than to render them inoperative; and with this view, where there is general evidence of acts having been legally and regularly done, to dispense with proof of circumstances strictly speaking essential to the validity of those acts, and by which they were probably accompanied in most instances, although in others the assumption rests solely on grounds of public policy.

Taking a general view of the subject, the acts or things thus presumed are divisible into three classes: 1. Where from the existence of posterior acts in a supposed chain of events the existence of prior acts in the chain is inferred or assumed, — as where a prescriptive right, or a grant, is inferred from modern enjoyment. 2. Where the existence of posterior acts is inferred from that of prior acts, — as where the sealing and delivery of a deed purporting to be signed, sealed, and delivered, are inferred on proof of the signing only. This is manifestly the reverse of the former, and, as a general rule, the presumption is much weaker. 3. Where intermediate proceedings are presumed, — as where livery of seisin is presumed, on proof of a feofiment and twenty years' enjoyment under it.

This principle will be considered: -

1. With respect to official appointments. It is a general principle, that a person's acting in a public capacity is prima facie evidence of his having been duly author-

ized so to do. And the principle holds in criminal cases as well as in civil.

This presumption is not restricted to appointments of a strictly public nature. It has been held to apply to constables and watchmen appointed by commissioners under a local act. But it does not, at least in general, hold in the case of private individuals, or agents supposed to be acting by their authority. Thus, it does not apply to an executor or administrator.

- 2. The maxim, "Omnia præsumuntur rite esse acta," holds in many cases where acts are required to be done by official persons, or with their concurrence.
- 3. With respect to judicial acts the maxim, "Omnia præsumuntur rite esse acta," has here a much more limited application. "With respect to the general principle of presuming a regularity of procedure, it may perhaps appear to be the true conclusion, that, wherever acts are apparently regular and proper, they ought not to be defeated by the mere suggestion of a possible irregularity. This principle, however, ought not to be carried too far, and it is not desirable to rest upon a mere presumption that things were properly done, when the nature of the case will admit of positive evidence of the fact, provided it really exists." It is a principle that irregularity will not be presumed, and there are several instances to be found in the books of the courts dispensing with formal proof of things necessary, in strictness, to give validity to judicial acts.

The maxim, "Omnia præsumuntur rite esse acta," does not apply to give jurisdiction to magistrates, or other inferior tribunals.

4. As to the application of this maxim to extra-judicial acts, such as written instruments, and matters in pais, it is an established rule, that deeds, wills, and other attested documents, which are thirty years old or upwards, and are produced from an unsuspected repository, prove themselves; although it is still competent to the opposite party to call witnesses to disprove the regularity of the execution. And there are many instances of the application of this presumption, even where it is strictly necessary to prove the execution of an attested instrument. Thus, where a deed is produced, purporting to have

been executed in due form by signing, sealing, and delivery, but the attesting witnesses can only speak to the fact of signing, it may be properly left to the jury to presume a sealing and delivery.

So, collateral facts requisite to give validity to instruments will, in general, be presumed.

This principle has also been extended to the construction of instruments. Thus, where deeds bear date on the same day, a priority of execution will be presumed, to support the clear intention of parties.

#### SUBSECTION V.

Presumptions from Possession and User.

By the law of England, possession, or quasi possession, as the case may be, is prima facie evidence of property,—"Melior (potior) est conditio possidentis"; and the possession of real estate, or the reception of the rents and profits from the person in possession, is prima facie evidence of the highest estate in that property, namely, a seisin in fee. But the strength of the presumption arising from possession of any kind is materially increased by the length of the time of enjoyment, and the absence of interruption or disturbance from others, who, supposing it illegal, were interested in putting an end to it. The rule is, that, where the facts show the long-continued exercise of a right, the court is bound to presume a legal origin, if such be possible, in favor of the right.

1. Among the various ways in which a title to property can be acquired, most systems of jurisprudence recognize that of "prescription," or undisturbed possession or user for a period of time, longer or shorter as fixed by law. According to the common law of England, this species of title cannot be made to land or corporeal hereditaments, or to such incorporeal rights as must arise by matter of record; and it is in general restricted to things which may be created by grant, such as rights of common, easements, franchises which can be created by grant without record, etc.

At the common law, every prescription must have been laid in the tenant of the fee simple; and parties holding any inferior interest in the land could not prescribe, by reason of the imbecility of their estates; but were obliged to prescribe under cover of the tenant in fee, by alleging his immemorial right to the subject-matter of the claim, and deducing their own title from him.

A prescriptive or customary right, in order to be valid, must have existed undisturbed from time immemorial; by which, at the common law, was meant, as the words imply, that no evidence, verbal or written, could be adduced of any time when the right was not in existence. By an equitable construction of the statute West. 1 (3 Edw. I.), c. 39, a period of legal memory was established — in contradistinction to that of living memory — by which every prescriptive claim was deemed indefeasible, if it had existed from the first day of the reign of Richard I. (A. D. 1189); and, on the other hand, to be at once at an end if shown to have had its commencement since that period.

After the time of limitation had been further reduced to sixty years by 32 Hen. VIII., c. 2, and in many cases, including the action of ejectment, to twenty years by 21 Jac. I., c. 16, it might have been expected that, by a similar equitable construction, the time of prescription would have been proportionably shortened. This, however, was not done, and it remained as before. But the Stat. 32 Hen. VIII., c. 2, affected the subject in this way, that whereas, previously, a man might have prescribed for a right, the enjoyment of which had been suspended for an indefinite number of years, it was thereby enacted that no person should make any prescription by the seisin or possession of his ancestors or predecessors, unless such seisin or possession had been within sixty years next before such prescription made.

A prescriptive title once acquired may be destroyed by interruption. But this must be understood to be an interruption of the right, not simply an interruption of the user. Thus, a prescriptive right may be lost or extinguished by a unity of possession of the right with an estate in the land as high and perdurable as that in the subject-matter of the right.

The time of prescription thus remaining unaltered, it is obvious that, if strict proof were required of the exercise of the supposed right up to the time of Richard I., the difficulty of establishing a prescriptive claim must have increased with each successive generation. The mischief was, however, considerably lessened by the

rules of evidence established by the courts. Modern possession and user being prima facie evidence of property and right, the judges attached to them an artificial weight, and held that, when uninterrupted, uncontradicted, and unexplained, they constituted proof from which a jury ought to infer a prescriptive right, coeval with the time of legal memory.

The length of possession and user necessary for this purpose depends in some degree on circumstances and the nature of the right claimed. Generally, in the case of things to which a title may be made by prescription, proof of enjoyment as far back as living memory raises a presumption of enjoyment from the remote era. And a like presumption may be made from an uninterrupted enjoyment for a considerable number of years.

Where there is general evidence of a prescriptive claim extending over a long time, the presumption of a right existing from time immemorial will not be defeated by proof of slight, partial, or occasional variations in the exercise or extent of the right claimed.

Although the user is not sufficiently long or uniform to raise the presumption of a prescriptive right, still it is entitled to its legitimate weight as evidence, from which, coupled with other circumstances, the jury may find the existence of the right.

The presumption of prescriptive right derived from enjoyment, however ancient, is instantly put an end to when the right is shown to have originated within the period of legal memory; and it is of course liable to be rebutted by any species of legitimate evidence, direct or presumptive; or even by the nature of the alleged right itself, which may make it impossible that it should have existed from the time of Richard I.

Notwithstanding the desire of the courts to uphold prescriptive rights, there were many cases in which the extreme length of the time of legal memory exercised a very mischievous effect; as the presumption from user, however strong, was liable to be altogether defeated by showing the origin of the claim at any time since the 1 Richard I. (A. D. 1189). Besides, possession and user are in themselves legitimate evidence of the existence of rights created since that period, the more obvious and natural proofs of which may

have perished by time or accident. "Tempus," says Sir Edward Coke, "est edax rerum : and records and letters patent, and other writings, either consume, or are lost, or embezzled; and God forbid that ancient grants and acts should be drawn in question, although they cannot be shown, which, at the first, was necessary to the per-Acting partly on this principle, but chiefly fection of the thing." for the furtherance of justice and the sake of peace, by quieting possession, the judges attached an artificial weight to the possession and user of such matters as lie in grant. where no prescriptive claim was put forward; and in process of time they established it as a rule, that twenty years' adverse and uninterrupted enjoyment of an incorporeal hereditament, uncontradicted and unexplained, was cogent evidence from which the jury should be directed conclusively to presume a grant, or other lawful origin of the possession. This period of twenty years seems to have been adopted by analogy to the Statute of Limitations, 21 Jac. I., c. 16, which makes an adverse enjoyment for twenty years a bar to an action of ejectment. For, as an adverse possession of that duration gave a possessory title to the land itself, it seemed reasonable that it should afford a presumption of right to a minor interest arising out of the land. The practical effect of this quasi præsumptio juris was considerably increased by the decision in Read v. Brookman; 1 namely, that it was competent to plead a right to an incorporeal hereditament by deed, and excuse profert of the deed by alleging it to have been lost by time and accident. It became, therefore, a usual mode of claiming title to an incorporeal hereditament, to allege a feigued grant, within the time of legal memory, from some owner of the land or other person capable of making such grant, to some tenant or person capable of receiving it, setting forth the names of the supposed parties to the document, with the excuse for profert that the document had been lost by time and accident. On a traverse of the grant, proof of uninterrupted enjoyment for twenty years was held cogent evidence of its existence; and this was termed making title by "nonexisting grant." "The presumption of right in such cases," says Mr. Starkie, "is not conclusive; in other words, it is not an inference of mere law, to be made by the courts; yet it is an inference which the courts advise juries to make, wherever the presumption stands unrebutted by contrary evidence."

In order, however, to raise this presumption against the owner of the inheritance, the possession must be with his acquiescence; and such a possession with the acquiescence of a tenant for life, or other inferior interest in the land, although evidence against the owner of the particular estate, will not bind the fee. But the acquiescence of the owner of the inheritance may either be proved directly, or inferred from circumstances.

This presumption only obtains its practically conclusive character, when the evidence of enjoyment during the required period remains uncontradicted and unexplained. [See the statutes 2 & 3 Will. IV., c. 71 & 100, shortening the time of prescription in certain cases.]

2. We proceed, in the second place, to consider the presumptions made from user, in cases of incorporeal rights not coming within the statutes above referred to. Among the foremost of these may be ranked the presumption of the dedication of highways to the public. "A road becomes public by reason of a dedication of the right of passage to the public by the owner of the soil, and of an acceptance of the right by the public." And such dedication may be either general or limited, - e. g. the owner of the soil may dedicate a footway to the public, subject to his right of periodically ploughing it up. The fact of dedication may either be proved directly, or inferred from circumstances, especially from that of permissive user on the part of the public. If a man opens his land so that the public pass over it continually, the public. after a user of a very few years, will acquire a right of way, unless some act be done by the owner to show that he had intended only to give a license to pass over the land, and not to dedicate a right of way to the public. Among acts of this kind may be reckoned the putting up a bar, or excluding by positive prohibition persons from passing. The common course is by shutting up the passage for one day in each year. Where no acts of this nature have been done, there is no fixed rule as to the length of user, which is sufficient, when unaccompanied by other

circumstances, to constitute presumptive evidence of a dedication; but unquestionably a much shorter time will suffice than is required to raise the presumption of a grant among private individuals. But the animus or intention of the owner of the soil in doing the act, or permitting the passage, must be taken into "In order to constitute a valid dedication to the public of a highway by the owner of the soil, it is clearly settled that there must be an intention to dedicate, - there must be an animus dedicandi, of which the user by the public is evidence. and no more; and a single act of interruption by the owner is of much more weight, upon a question of intention, than many acts of enjoyment." But the dedication of a highway to the public must be the act, or at least with the consent, of the owner of the fee; the act or assent of a tenant for any less interest will not suffice, although the assent of the owner of the inheritance may be inferred from circumstances.

The presumption of the surrender or extinguishment of incorporeal rights by non-user. This is altogether unaffected by the prescription acts. The result of the cases seems to be that the non-user of a privilege or easement is merely evidence of abandonment; and that the question of abandonment is one of fact, which must be determined on the whole of the circumstances of each particular case.

Easements are divided into continuous and intermittent,—the former being those of which the enjoyment is or may be continual, without the necessity of any actual interference by man, as water-spouts, the right to air, light, etc.; and the latter being those of an opposite description, such as rights of way, etc. With respect to continuous easements, the correct inference from the cases seems to be, that there is no time fixed by law during which the cessation of enjoyment must continue, in order to raise the presumption of an abandonment; but it is for the jury to take all the circumstances of the case into their consideration, in order to see if there has been an intention to renounce the right.

With respect to easements of the intermittent kind, it seems clear that mere intermittence of the user, or slight alterations in the mode of enjoyment, will not be

sufficient to destroy the right, when circumstances do not show any intention of relinquishing it; whiist, on the other hand, a much shorter period than twenty years, when it is accompanied by circumstances such as disclaimer, or other indication of intention to abandon the right, will be sufficient to raise the presumption of extinguishment.

Licenses may be presumed; and, as a general rule, from a much shorter period of enjoyment than twenty years.

3. Presumptions of fact in support of beneficial enjoyment. The general principle governing the subject is thus stated by Tindal, C. J.: "No case can be put in which any presumption" (semble, any artificial presumption) "has been made, except where a title has been shown by the party who calls for the presumption, good in substance, but wanting some collateral matter to make it complete in point of form. In such case, where the possession is shown to have been consistent with the existence of the fact directed to be presumed, and in such cases only, has it ever been allowed."

There is hardly a species of act or document, public or private, that will not be presumed in support of possession. Matters of record generally, and even acts of Parliament, at least very ancient ones, will thus be presumed; as also will grants from the Crown, letters patent, writs of ad quod damnum and inquisitions thereon, by-laws of corporations, fines and recoveries, etc.

#### Subsection VI.

Presumptions from the Ordinary Conduct of Mankind, the Habits of Society, and the Usages of Trade.

The presumptions drawn from the ordinary conduct of mankind, the habits of society, and the usages of trade, are numerous; and several of them come under the head of presumptions of law. The occupation of land carries with it an implied agreement, on the part of the tenant, to manage the land according to the course of good husbandry and the custom of the country. A promise to marry generally is interpreted as a prom-

ise to marry within a reasonable time; and, on proof of a regular marriage per verba de præsenti, consummation is implied. The cancelling or taking the seals off a deed, or tearing a will in pieces, is prima facie evidence of revocation.

It may be stated as a general rule, that, prima facie, documents should be taken to have been made or written on the day they bear date. This has been held to apply to letters, bills of exchange, and promissory notes, and the indorsements on them, and also to banker's checks.

Many presumptions are drawn from the usual course of business in public offices. With regard to the course of the post, it was in several early cases ruled that, if a letter is put into a post-office, that is prima facie proof, until the contrary appears, that the party to whom it is addressed received it in due course. Presumptions of this kind are also made from the course of business in private offices; such as those of merchants, solicitors, etc.

There are several other presumptions drawn from the usages of trade. Thus, where a partnership is found to exist between two persons, but there is no evidence to show in what proportions they are interested, it is presumed that they are interested in equal moieties. So, bills of exchange and promissory notes are presumed to have been given for consideration.

#### Subsection VII.

Presumption of the Continuance of Things in the State in which they have once existed.

It is a very general presumption, that things once proved to have existed in a particular state are to be understood as continuing in that state until the contrary is established by evidence, either direct or circumstantial. Thus, where seisin of an estate has been shown, its continuance will be presumed; as also will that of a parochial settlement, of the authority of an agent, etc. So, although the law in general presumes against insanity, yet, where the fact of insanity has been shown, its continuance will be presumed; and

the proof of a subsequent lucid interval lies on the party who asserts it.

There are two particular cases which will require special consideration: namely, the presumption of the continuance of debts, obligations, etc., until discharged or otherwise extinguished: and the presumption of the continuance of With respect to the former of these, a debt human life. once proved to have existed is presumed to continue, unless payment, or some other discharge, be either proved or established by circumstances. A receipt under hand and seal is the strongest evidence of payment, for it amounts to an estoppel, conclusive on the party making it; but a receipt under hand alone, or a verbal admission of payment, is in general only prima facie evidence of it, and may be rebutted. The fact of payment may be presumed from any other circumstance which renders that fact probable; as, for instance, the settlement of accounts subsequent to the accruing of the debt, in which no mention is made of it.

Presumptions respecting the continuance of human life. There is certainly, in the English law, no præsumptio juris relative to the continuance of life, in the abstract. The death of any party once shown to have been alive is matter of fact to be determined by a jury; and as the presumption is in favor of the continuance of life, the onus of proving the death lies on the party who asserts it.

The fact of death may, however, be proved by presumptive, as well as by direct evidence. When a person goes abroad, and has not been heard of for a long time, the presumption of the continuance of life ceases at the expiration of seven years from the period when he was last heard of. And the same rule holds, generally, with respect to persons who are absent from their usual places of resort, and of whom no account can be given. This is a mixed presumption, said to have been adopted by analogy to the statutes 1 Jac. I., c. 11, s. 2, and 19 Car. II., c. 6, s. 2.

But where a party has been absent for seven years, without having been heard of, the only presumption arising is that he is dead; there is none as to the time of

his death. And if it be sought to establish the precise time of such person's death, this must be done affirmatively, by evidence of some sort beyond the mere fact that seven years have elapsed since such person was last heard of.

No presumption of survivorship. Where several persons, generally of the same family, have perished by a common calamity, such as shipwreck, earthquake, conflagration, railway accident, or battle, and where the priority in point of time of the death of one over the rest exercises an influence on the rights of third parties, the English law recognizes no artificial presumption, but leaves the real or supposed superior strength of one of the persons perishing by a common calamity to its natural weight, i. e. as a circumstance proper to be taken into consideration by a judicial tribunal, but which standing alone is insufficient to shift the burden of proof.

### SUBSECTION VIII.

Presumptions in Disfavor of a Spoliator.

Another very important maxim is, "Omnia præsumuntur contra spoliatorem," or "Omnia præsumuntur in odium spoliatoris," a maxim resting partly on natural equity. but much strengthened by the artificial policy of law. The leading case on this subject is that of Armory v. Delamirie,1 where a person in a humble station of life, having found a jewel, took it to the shop of a goldsmith to inquire its value, who, having got the jewel into his possession under pretence of weighing it, took out the stones, and, on the finder refusing to accept a small sum for it, returned to him the empty socket. An action of trover having been brought, to recover damages for the detention of the stones, the jury were directed that, unless the defendant produced the jewel and thereby showed it not to be of the finest water, they should presume the strongest against him, and make the value of the best jewels that would fit the socket the measure of their damages.

But the most usual application of this principle is where there has been any forensic malpractice, — by eloigning,

<sup>1 1</sup> Stra. 505; 1 Sm. L. C.

suppressing, defacing, destroying, or fabricating documents, or other instruments of evidence, or introducing into legal proceedings any species of the crimen falsi. This not only raises a presumption that the documents or evidence eloigned, suppressed, etc. would, if produced, militate against the party eloigning, suppressing, etc., but procures more ready admission to the evidence of the opposite side. "If," says Lord Chief Justice Holt, "a man destroys a thing that is designed to be evidence against himself, a small matter will supply it." This rule is evidently based on the principle, that no one shall be allowed to take advantage of his own wrong.

It is said that the presumption against the spoliator of documents is not confined to assuming those documents to be of a nature hostile to him, and procuring a more favorable reception for the evidence of his opponent; but that it has the further effect of casting suspicion on all the other evidence adduced by the party guilty of the malpractice.

The presumption arising from the fabrication or corruption of instruments of evidence is even stronger than that arising from the suppression or destruction of them.

However salutary, and in general equitable, the maxim, "Omnia presumuntur contra spoliatorem," must be acknowledged to be, it has been made the subject of very fair and legitimate doubt whether it has not occasionally been carried too far.

Whatever weight may be legitimately attached to this presumption in civil cases, great care must be taken in criminal cases, where life or liberty is at stake, not to give to spoliation, or similar acts, any weight to which they are not entitled.

#### SUBSECTION IX.

# Presumptions in International Law.

The public international law is adopted by the common law, and is held to be part of the law of the land.

Where the subject of one state is also the independent sovereign of another, he is, of course, not responsible to the laws of the former state for acts done by him as such sovereign.

And it seems that, in respect to any act done by such a person out of the realm of which he is a subject, or any act as to which it might be doubtful whether it ought to be attributed to the character of the sovereign prince or to that of the subject, the act ought to be presumed to have been done in the character of the sovereign prince.

The principle of presuming in disfavor of a spoliator is recognized in international law, especially in those cases where papers have been spoliated by a captured party, and where neutral vessels are found carrying despatches from one part of the dominions of a belligerent power to another.

With respect to private international law, its very existence rests on one important presumption. "In the silence of any positive rule," says Dr. Story, "affirming, or denying, or restraining the operation of foreign laws, courts of justice presume the tacit adoption of them by their own government, unless they are repugnant to its policy, or prejudicial to its interests." "A spirit of comity, and a disposition to friendly intercourse, are presumed to exist among nations as well as among individuals."

The place of a person's birth is considered as his domicil, if it is at the time of his birth the domicil of his parents. But a more important rule is, that the place where a person lives must be taken, prima facie, to be his domicil, until other facts establish the contrary. Where the family of a married man resides is generally to be deemed his domicil, and that of an unmarried man will be taken to be in the place where he transacts his business, exercises his profession, or assumes and exercises municipal duties or privileges. And it is said to be a principle, that, where the place of domicil is fixed or determined by positive facts, presumptions from mere circumstances will not prevail against those facts.

Generally speaking, the validity of a contract is to be decided by the law of the place where it is made, unless it is to be performed in another country; for in the latter case the law of the place of performance is to govern, because such may well be presumed to have been the intention of the parties. So, a foreign marriage will be presumed to have been celebrated with the

solemnities required by the law of the place where it is celebrated. And the general presumptions against crime, fraud, covin, immorality, etc., are applicable to acts done abroad.

#### Subsection X.

Presumptions in Maritime Law.

Among the most important presumptions in maritime law are those relating to seaworthiness.

Every ship insured on a voyage policy sails under an implied warranty that she is seaworthy. It is not necessary to inquire whether the assured acted honestly and fairly in the transaction; however just and honest his intentions may have been, if he was mistaken in the fact, and the vessel was not seaworthy, the underwriter is not liable. But if a ship, shortly after sailing, turns out to be unfit for sea, without apparent or adequate cause, the burden of proof is thrown on the assured; and a jury ought to presume that the unseaworthiness existed before the commencement of the voyage. And this rule holds even though the ship encountered a violent storm, unless it can fairly be inferred that the damage resulted from the storm. The implied warranty of seaworthiness, however, does not extend to time policies.

Where a vessel is missing, and no intelligence of her has been received within a reasonable time after she sailed, it is to be presumed that she foundered at sea. There is no precise time for this presumption fixed, either by the common or general maritime law, although the laws of some countries have peculiar provisions on the subject; but the court and jury will be guided by the circumstances laid before them, and the nature of the voyage and navigation. In order, however, to raise this presumption, it must be distinctly shown that the ship left port, bound on her intended voyage.

# Subsection XI.

## Miscellaneous Presumptions.

A large number of these presumptions relate to real estate, and are for the most part quasi prasumptiones juris,

i. e. presumptions which are almost as obligatory as presumptions of law, but which cannot be made without the intervention of a jury. Thus, the soil of the sea-shore, between high and low water mark, is presumed to belong to the Crown; and so is the soil at the bottom of a navigable tidal river. Where a river is not navigable. the bed is presumed to be the property of the owners on each side. ad medium filum aqua. The same principle holds in the case of a public highway. - the soil of which is taken, prima facie, to belong to the owners of the adjoining lands, usque ad medium filum via. and it also applies to the case of a private road. Strips of land adjoining a road are presumed to belong to the owner of the adjoining enclosed land, and not to the lord of the manor. In the case of party-walls, where the quantity of land contributed by each owner is unknown, the common use of the wall is prima facie evidence that it and the land on which it is built are the undivided property of both.

Several presumptions are founded on the relations in which parties stand to each other. Thus, a woman who commits felony, or perhaps misdemeaner, in company with her husband, is excused, on the presumption (which however may be rebutted) of her having acted under his coercion.

In the case of contracts between individuals, there are many presumptions of law based on policy and general convenience. Thus, it is a conclusive presumption of law, that an instrument under seal has been given for consideration; and this presumption can only be removed by impeaching the instrument for fraud. So, although in the case of contracts not under seal a consideration is not in general presumed, it is otherwise in the case of bills of exchange and promissory notes.

Where goods intrusted to a common carrier, to be carried for reward, are lost otherwise than by the act of God or the Queen's enemies, it is a præsumptio juris et de jure that they were lost by negligence, fraud, or connivance on his part. By the act of God is meant storms, lightning, floods, earthquakes, and such direct, violent, sudden, and irresistible act of nature as could not by any reasonable care have been foreseen or resisted; and under the head of the Queen's enemies must be understood public enemies, with whom the nation

is at open war; so that robbery by a mob, irresistible from their number, would be no excuse for the bailee.

So, in the case of innkeepers, before the 26 & 27 Vict., c. 41, — which has considerably modified their liability, — where the goods of a traveller brought into an inn were lost, it was presumed to be through negligence in the innkeeper; and the law cast on him the onus of rebutting this presumption.

#### SECTION III.

Presumptions and Presumptive Evidence in Criminal Law.

#### SUBSECTION I.

Presumptions in Criminal Law.

Not only are the general presumptions of law recognized in criminal jurisprudence, but it has peculiar presumptions of its own. The universal presumption of acquaintance with the penal law, and the maxim, "Res judicata pro veritate accipitur," exist there in full force. Ignorance of any law which has been duly pronulgated cannot be pleaded in a criminal court; and a person who has once been tried for an offence, under circumstances where his safety was in jeopardy by the proceedings, cannot, if acquitted, be tried again for that offence.

A criminal intent is often presumed from acts which, morally speaking, are susceptible of but one interpretation. When, for instance, a party is proved to have laid poison for another, or to have deliberately struck at him with a deadly weapon, or to have knowingly discharged loaded fire-arms at him, it would be absurd to require the prosecutor to show that he intended death or bodily harm to that person. So, where a party deliberately publishes defamatory matter, malice will be presumed.

A criminal intent is sometimes transferred by law from one act to another, the maxim being, "In criminalibus sufficit generalis malitia intentionis cum facto paris gradu." A., maliciously discharging a gun at B., kills C.; A. is guilty of murder, for the malice is transferred from B. to C.

In some cases the law goes farther, and attaches to acts criminal in themselves a degree of guilt higher than that to which they are naturally entitled. Thus, if a man, without justification, assaults another with the intention of giving him only a slight beating, and death ensues, he is held to be guilty of homicide. And if several persons go out with the intention of committing a felony, and in the prosecution of the general design one of them commits any other felony, all are accountable for it.

Some presumptions of the criminal law are for the protection of accused persons. Thus, an infant under seven years of age is conclusively presumed incapable of committing felony; between the ages of seven and fourteen the presumption exists, but may be rebutted by evidence; and a boy under fourteen is conclusively presumed incapable of committing a rape as princicipal in the first degree.

#### Subsection II.

Presumptive Proof in Criminal Cases generally.

The rules regulating the admissibility of evidence are, in general, the same in civil as in criminal proceedings; and although presumptive evidence is receivable to prove almost any fact, the necessity for resorting to it is more frequent in the latter than in the former.

Numerous rules have from time to time been suggested for the guidance of tribunals in determining the degrees of the credibility of evidence, among which the following are the soundest in principle, and most generally recognized in practice:—

- 1. The onus of proving everything essential to the establishment of the charge against the accused, lies on the prosecutor.
- 2. The evidence must be such as to exclude, to a moral certainty, every reasonable doubt of the guilt of the accused.
- 3. In matters of doubt it is safer to acquit than to condemn; for it is better that several guilty persons should escape, than that one innocent person should suffer.

The above hold universally; but there are two others peculiarly applicable when the proof is presumptive:—

1. There must be clear and unequivocal proof of the corpus delicti.

Where, however, the fact of a murder is proved by eyewitnesses, the inspection of the dead body may be dispensed with.

The basis of a corpus delicti once established, presumptive evidence is receivable to complete the proof of it; as, for instance, to fix the place of the commission of the offence, — the locus delicti; and even to show the presence of crime, by negativing the hypotheses that the facts proved were the result of natural causes, or irresponsible agency. For this purpose all the circumstances of the case, and every part of the conduct of the accused, may be taken into consideration. On fluding a dead body, for instance, it should be considered whether death may not have been caused by lightning, cold, noxious exhalations, etc., or have been the result of suicide.

Whatever may be the admissibility or effect of presumptive evidence to prove the corpus delicti, it is always admissible, and it is often, especially when amounting to evidentia rei, most powerful to disprove it. Thus, the probability of the statements of witnesses may be tested by comparing their story with the surrounding circumstances; and in practice false testimony is often encountered and overthrown in this way.

2. The hypothesis of delinquency should be consistent with all the facts proved. It should never be forgotten, that all facts and circumstances which have really happened were perfectly consistent with each other, for they did actually so consist; an inevitable consequence of which is, that if any of the circumstances established in evidence are absolutely inconsistent with the hypothesis of the guilt of the accused, that hypothesis cannot be true.

#### SUBSECTION III.

## Inculpatory Presumptive Evidence in Criminal Proceedings.

I. Motives to commit the offence, and means and opportunities of committing it. — The mere fact of a party being so situated that an advantage would accrue to him from the commission of a crime, amounts to nothing, or next to nothing, as a proof of his having committed it. Still, under certain circumstances, the existence of a motive becomes an important element in a chain of presumptive proof; as where a person accused of having set fire to his house has previously insured it to an amount exceeding its value. On the other hand, the absence of any apparent motive is always a fact in favor of the accused; although the existence of motives invisible to all except the person who is influenced by them must not be overlooked.

The infirmative hypotheses affecting motives to commit an offence are applicable, also, to means and opportunities of committing it.

II. Preparations for the commission of an offence, and previous attempts to commit it. — Under the head of preparations for the commission of an offence may be ranked the purchasing, collecting, or fashioning instruments of mischief; repairing to the spot destined to be the scene of it; acts done with the view of giving birth to productive or facilitating causes, or of removing obstructions to its execution, or averting suspicion from the criminal. Besides preparations of this nature, which are immediately pointed to the accomplishment of the principal design, there are others of a secondary nature, for preventing discovery or averting suspicion of the former. In addition to these preparations of the second order may be imagined preparations of the third and fourth orders, and so on.

The probative force, both of preparations and previous attempts, manifestly rests on the presumption, that an intention to commit the individual offence was formed in the mind of the accused, which persisted until power and opportunity were found to carry it into execution. But, however strong this presumption may be when the corpus delicti has been proved, it must be taken in connection with the following infirmative hypotheses.

1st. The intention of the accused in doing the suspicious act is a psychological question and may be mistaken. His intention may either have been altogether innocent, or, if criminal, directed towards a different object.

2d. But even when preparations have been made with the intention of committing, or previous attempts have been made to commit, the identical offence charged, two things remain to be considered:

1. The intention may have been changed or abandoned before execution. Until a deed is done there is always a locus panientia.

2. The intention to commit the crime may have persisted throughout, but the criminal may have been anticipated by others.

III. Declarations of intention to commit an offence, and threats to commit it. — Most of the infirmative hypotheses applicable to the former are incident to those now under consideration; and these, besides, have some which are peculiar to themselves. 1st. The words supposed to be declaratory of criminal intention may have been misunderstood or misremembered. 2d. It does not necessarily follow, because a man avows an intention, or threatens to commit a crime, that such intention really exists in his mind. 3d. Besides, another person really desirous of committing the offence may have profited by the occasion of the threat to avert suspicion from himself. 4th. It must be remembered that a threat or declaration of this nature tends to frustrate its own accomplishment.

IV. Change of life or circumstances not easily capable of explanation, except on the hypothesis of the possession of the fruits of crime; as, for instance, where, shortly after a larceny or robbery, or the suspicious death or disappearance of a person in good circumstances, a person previously poor is found in the possession of considerable wealth, and the like. When standing alone, this is not ground for putting a party on his defence.

V. Evasion of justice. — By "evasion of justice" is meant the doing some act indicative of a desire to avoid or stifle judicial inquiry into an offence, of which the party doing the act is accused or suspected. Such desire may be evidenced by his flying from the country or neighborhood; removing himself, his family, or his goods to another place; keeping concealed, etc. To these must be added the kindred acts of bribing or tampering with officers of justice, to induce them to permit escape, suppress evidence, etc. All

these afford a presumption of guilt, more or less cogent according to circumstances.

VI. Fear indicated by passive deportment, etc. — The following physical symptoms may be indicative of fear: "Blushing, paleness, trembling, fainting, sweating, involuntary evacuations, weeping, sighing, distortions of the countenance, sobbing, starting, pacing, exclamation, hesitation, stammering, faltering of the voice," etc.; and, as the probative force of each of these depends on the correctness of the inference that the symptom has been caused by fear of detection of the offence imputed, two classes of infirmative hypotheses naturally present themselves: 1st. The emotion of fear may not be present in the mind of the individual. 2d. The emotion of fear, even if actually present, although presumptive, is by no means conclusive evidence of guilt of the offence imputed. Lastly, the rare, though no doubt possible, case of the falsity of the supposed self-criminative recollection.

Closely allied to this subject is the inference of the existence of alarm, and through it of delinquency, derived from confusion of mind; as expressed in the countenance, or by discourse, or conduct. This, however, like the former, is subject to the infirmative hypotheses, —1st. That the alarm may be caused by the apprehension of some other crime, or some disagreeable circumstance coming to light; 2d. Consciousness on the part of the accused or suspected person that, though innocent, appearances are against him.

VII. Fear indicated by a desire for secrecy.— The presence of fear may be evidenced in another way, namely, by acts showing a desire for secrecy; such as doing in the dark what, but for the criminal design, would naturally have been done in the light; choosing a spot supposed to be out of the view of others for doing that which, but for the criminal design, would naturally have been done in a place open to observation; disguising the person; taking measures to remove witnesses from the scene of the intended unlawful action, etc. Acts such as these are, however, frequently capable of explanation. 1st. It is perfectly possible that the design of the person seeking secrecy may be altogether innocent, at least so far as the criminal law is concerned. 2d. The design, even if criminal, may be criminal with a different object, and of a degree less culpable than that attributed.

### CHAPTER III.

#### PRIMARY AND SECONDARY EVIDENCE.

The exaction of original evidence is unquestionably one of the most marked features of English law. the present chapter we propose to consider the application of this principle to the proof of instruments and documents, which are sufficiently identified by description, and proximate to the issues raised, to be at least prima facie receivable in evidence. said to be the "primary evidence" of their own contents; and the term "secondary evidence" is used to designate any derivative proof of them; such as memorials, copies, abstracts, recollections of persons who have read them, etc. It is a general and well-known rule, that no secondary evidence of a document can be received until an excuse such as the law deems sufficient is given for the non-production of the primary. Whether a proper foundation has been laid for the admission of secondary evidence is to be determined by the judge, and if this depends on a disputed question of fact he must decide it.

Is this principle confined to evidence in causa, or does it extend to evidence extra causam? The following questions were put by the House of Lords, and the following answers given by the judges, during the proceedings against Queen Caroline, in 1820:1 "First, Whether, in the courts below, a party, on cross-examination, would be allowed to represent in the statement of a question the contents of a letter, and to ask the witness whether the witness wrote a letter to any person with such contents, or contents to the like effect, without having first shown to the witness the letter, and having asked that witness whether the witness wrote that letter, and his admitting that he wrote such letter?" "Secondly, Whether, when a letter is produced in the courts below, the court would allow a witness to be asked, upon showing the witness only a part of, or one or more lines of such letter, and not the

whole of it, whether he wrote such part or such one or more lines: and, in case the witness shall not admit that he did or did not write the same, whether the witness can be examined as to the contents of such letter?" "Thirdly, Whether, when a witness is cross-examined. and, upon the production of a letter to the witness under crossexamination, the witness admits that he wrote that letter, the witness can be examined in the courts below, whether he did not, in such letter, make statements such as the counsel shall, by onestions addressed to the witness, inquire are or are not made therein; or whether the letter itself must be read as the evidence to manifest that such statements are or are not contained therein; and in what stage of the proceedings, according to the practice of the courts below, such letter could be required by counsel to be read, or be permitted by the court below to be read?" The first of these questions the judges answered in the negative; on the ground that "The contents of every written paper are, according to the ordinary and well-established rules of evidence, to be proved by the paper itself. and by that alone, if the paper be in existence : the proper course, therefore, is to ask the witness whether or no that letter is of the handwriting of the witness. If the witness admits that it is of his or her handwriting, the cross-examining counsel may, at his proper season, read that letter as evidence, and, when the letter is produced, then the whole of the letter is made evidence." The first part of the second question, namely, "Whether, when a letter is produced in the courts below, the court would allow a witness to be asked, upon showing the witness only a part of, or one or more lines of such letter, and not the whole of it, whether he wrote such part?" the judges thought, should be answered by them in the affirmative in that form : but to the latter, "and in case the witness shall not admit that he did or did not write such part, whether he can be examined as to the contents of such letter," they answered in the negative, for the reasons already given. To the first part of the third question. Lord Chief Justice Abbott answered as follows: "The judges are of opinion, in the case propounded, that the counsel cannot, by questions addressed to the witness, inquire whether or no such statements are contained in the letter; but that the letter itself must be read to manifest whether such statements are or are not contained in that letter." To the latter part of the ques-

tion he returned for answer, "The judges are of opinion, according to the ordinary rule of proceeding in the courts below, the letter is to be read as the evidence of the cross-examining counsel, as part of his evidence, in his turn, after he shall have opened his case: that that is the ordinary course; but that, if the counsel who is cross-examining suggests to the court that he wishes to have the letter read immediately, in order that he may, after the contents of that letter shall have been made known to the court, found certain questions upon the contents of that letter, to be propounded to the witness, which could not well or effectually be done without reading the letter itself, that becomes an excepted case in the courts below. and for the convenient administration of justice the letter is permitted to be read at the suggestion of the counsel, but considering it, however, as part of the evidence of the counsel proposing it, and subject to all the consequences of having such letter considered as part of his evidence."

The foregoing questions and answers were followed by this:1 "Whether, according to the established practice in the courts below, counsel cross-examining are entitled, if the counsel on the other side object to it, to ask a witness whether he has made representations of a particular nature, not specifying in his question whether the question refers to representations in writing or in words?" Lord Chief Justice Abbott delivered the following answer of the judges: "The judges find a difficulty to give a distinct answer to the question thus proposed by your lordships, either in the affirmative or negative, inasmuch as we are not aware that there is, in the courts below, any established practice which we can state to your lordships, as distinctly referring to such a question propounded by counsel on cross-examination as is here contained: that is, whether the counsel cross-examining are entitled to ask the witness whether he has made such representation; for it is not in the recollection of any one of us that such a question, in those words, namely, 'whether a witness has made such and such representation,' has at any time been asked of a witness. Questions, however, of a similar nature are frequently asked at Nisi Prius, referring rather to contracts and agreements, or to supposed contracts and agreements, than to declarations of the witness; as, for instance, a witness is

often asked whether there is an agreement for a certain price for a certain article. - an agreement for a certain definite time. - a warranty. - or other matter of that kind, being a matter of contract: and when a question of that kind has been asked at Nisi Prius the ordinary course has been for the counsel on the other side not to object to the question as a question that could not properly be put, but to interpose, on his own behalf, another intermediate question: namely, to ask the witness whether the agreement referred to in the question originally proposed by the counsel on the other side was or was not in writing; and, if the witness answers that it was in writing, then the inquiry is stopped, because the writing must be itself produced. My lords, therefore, although we cannot answer your lordships' question distinctly in the affirmative or the negative, for the reason I have given, yet, as we are all of opinion that the witness cannot properly be asked, on cross-examination, whether he has written such a thing (the proper course being to put the writing into his hands and ask him whether it be his writing), we each of us think that, if such a question were propounded before us at Nisi Prius, and objected to, we should direct the counsel to separate the question into its parts. By dividing the question into parts, I mean. that the counsel would be directed to ask whether the representation had been made in writing or by words. If he should ask whether it had been made in writing, the counsel on the other side. would object to the question; if he should ask whether it had been made by words, that is, whether the witness had said so and so, the counsel would undoubtedly have a right to put that question, and probably no objection would be made to it."

[This rule has been changed in England by the Common Law Procedure Act, 1854 (17 & 18 Vict., c. 125, s. 24).]

When the absence of the primary source of evidence has been accounted for, secondary evidence is receivable. The excuses which the law allows for dispensing with primary evidence are, that the document has been destroyed or lost; or that it is in the possession of the adversary, who does not produce it after due notice calling on him so to do; or in that of a party privileged to withhold it, who insists on his privilege; or who is out of the jurisdiction of the court, and consequently cannot be compelled to produce it.

Whether a sufficient foundation has been laid for admitting secondary evidence depends on whether sufficient proof has been given of the destruction or loss of the document: whether a notice to produce is required. - as in many cases the proceedings amount to constructive notice; and if so, whether the notice given is sufficient in its terms, and has been given in proper time. etc. There are, however, some general principles which should always be borne in mind. First. Whether sufficient search has been made for a document depends much on its nature and the circumstances of the case, -as a useless document may be presumed to have been lost or destroyed, on proof of a much less search, and after a much shorter time, than an important Secondly. The sole object of such a notice is to enable the party to have the document in court to produce it if he likes; and if he does not, then to enable the opponent to give secondary evidence. Accordingly, where a party to a suit, or his attorney, has a document with him in court, he may be called on to produce it without previous notice; and in the event of his refusing, the opposite party may give secondary evidence.

Secondary evidence must be legitimate evidence, inferior to the primary solely in respect of its derivative character. Thus, the copy of a copy of a destroyed or lost document is not receivable in evidence, even though, as it seems, the absence of the first copy has been satisfactorily explained.

It is of the utmost importance to remember that there are no degrees of secondary evidence. A party entitled to resort to this mode of proof may use any form of it; his not adducing, or even wilfully withholding, some other, likely to be more satisfactory, is only matter of observation for the jury. Thus, the evidence of a witness who has read a destroyed or lost document is perfectly receivable, although a copy or abstract of it is in existence, and perhaps even in court.

There are several exceptions to the rule which requires primary evidence to be given. The following are the principal:

1. Where the production of it is physically impossible, as where characters are traced on a rock; or, 2. Where it would be highly inconvenient on physical grounds; as where they

are engraven on a tombstone, or chalked on a wall or building, or contained in a paper permanently fixed to it, etc.

8. With respect to the proof of records, and other public documents of general concernment, their contents may be proved by derivative evidence. But the law requires this derivative evidence to be of a very trustworthy kind; and has defined, with much precision, the forms of it which may be resorted to in proof of the different sorts of public writings. Thus, it must, at least in general, be in a written form, i. e. in the shape of a copy; and, as already mentioned, must not be a copy of a copy. In very few, if in any instances, is oral evidence receivable to prove the contents of a record or public book which is in existence.

The principal sorts of copies used for the proof of documents are. - 1. Exemplifications under the great seal. 2. Exemplifications under the seal of the court where the record is. 3. Office copies, i. e. copies made by an officer appointed by law for the purpose. 4. Examined copies. An examined copy is a copy sworn to be a true copy, by a witness who has compared it line for line with the original, or who has examined the copy while another person read the original. document must be in a character and language that the witness understands, and he must also have read the whole of it. According to most authorities, when the latter of the above modes of examination is resorted to, it is unnecessary to call both the persons engaged in it, or that they should have alternately read and inspected the original and copy. 5. Copies signed and certified as true by the officer to whose custody the original is intrusted. 6. Photograph copies, — of all others the best for showing any neculiarities that exist in the original document, and consequently invaluable in cases turning on those peculiarities. There are a few instances where none of these various species of copies is receivable, and the original must be produced. Of these the principal is where the gist of a party's action or defence lies in a record of the court where the cause is, and issue is joined on a plea of nul tiel record.

Public documents, though not of a judicial nature, such as registers of births, marriages, and deaths; the books of the Bank of England, or of the East India Company; bank bills on file at the bank, etc., — are, in general, provable by examined copies.

- Another exception is in the case of public officers. It is a
  general principle that a person's acting in a public capacity
  is prima facie evidence of his having been duly authorized so to do; and even though the office be one the appointment to which must be in writing, it is not, at least in the first
  instance, necessary to produce the document, or account for its
  non-production.
  - 5. Where a witness is being interrogated on the voir dire, with the view of ascertaining his competency, if that competency depends on written instruments he may state their nature and contents.

'Circumstantial evidence, when original and proximate in its nature, is not affected by the rule. It seems also, although much has been said and written on both sides of the question, that statements by a party against his own interest are receivable as primary proof of documents.

## CHAPTER IV.

#### DERIVATIVE EVIDENCE IN GENERAL.

The danger of this kind of proof increases according to its distance from its source, and the number of media or instruments through which it comes to the cognizance of the tribunal. There are five forms of it:—1. Supposed oral evidence, delivered through oral. 2. Supposed written evidence, delivered through written. 3. Supposed oral evidence, delivered through written. 4. Supposed written evidence, delivered through oral. 5. Reported real evidence. The last of these, and the secondary evidence of documents which would be evidence if produced, have been already considered; and the present chapter will be devoted to the admissibility of derivative evidence in general.

The general rule is, that derivative or second-hand proofs are not receivable as evidence in causa, — a rule

which forms one of the distinguishing features of our law of evidence. The reasons commonly assigned for it are: 1. That the party against whom the proof is offered has no opportunity of cross-examining the original source whence it is derived. 2. That, assuming the original evidence truly reported, it was not itself delivered under the sanction of an oath. The derivative evidence would not, however, be the more receivable if the original evidence were delivered under that sanction.

The foundations of the rule lie much deeper than this. Instead of stating as a maxim, that the law requires all evidence to be given on oath, we should say that the law requires all evidence to be given under personal responsibility; i. e. every witness must give his testimony under such circumstances as expose him to all the penalties of falsehood which may be inflicted by any of the sanctions of truth.

The rule in question is commonly enunciated, both in the books and in practice, by the maxim, "Hearsay is not evidence."an expression inaccurate, and which has caused the true nature of the rule to be very generally misunderstood. The language of this formula conveys two erroneous notions to the mind: first, directly, that what a persón has been heard to say is not receivable in evidence; and, secondly, by implication, that whatever has been committed to writing, or rendered permanent by other means, is receivable: positions neither of which is even generally true. the one hand, what a man has been heard to say against his own interest is not only receivable, but is the very best evidence against him; and on the other, written documents with which a party is not identified are frequently rejected. Hence it is that hearsay evidence is so often confounded with res gestee, i. e. the original proof of what has taken place; which may consist of words, as well as of acts. Thus, on an indictment for treason in leading on a riotous mob, evidence of the cry of the mob is not hearsay, and is as original as any evidence can be; and so are the cries of a woman who is being ravished, and her complaint afterwards, but not the particulars of such complaint. We are not to consider whether evidence comes by word of mouth or by writing but whether it is original in its nature, or indicates any better source from which it derives its weight.

There are several exceptions to the rule excluding second-hand evidence:—

- 1. On a second trial of a cause between the same parties, the evidence of a witness examined at the former trial, and since deceased, is receivable; and may be proved by the testimony of a person who heard it, or by notes made at the time.
- 2. The next exception is in the proof of matters of public and general interest; such as the boundaries of counties or parishes, rights of common, claims of highway, etc., which the law allows to be proved by general reputation;—e.g. by the declarations of deceased persons who may be presumed to have had competent knowledge on the subject; by old documents of various kinds, which, under ordinary circumstances, would be rejected for want of originality, etc. But in order to guard against fraud, it is an established principle that such declarations, etc. must have been made ante litem motam; which seems to mean, before any controversy has arisen on the subject to which the declarations relate, whether such controversy has or has not been made the subject of a lawsuit.
- 3. Matters of pedigree, e. g. the fact of relationship between particular persons, the births, marriages, and deaths of members of a family, etc., form the next exception. Thus, declarations of deceased members of a family, made ante litem motam, and not made by the declarant obviously for his own interest; the general reputation of a family proved by a surviving member of it; entries contained in books, such as family Bibles, if produced from the proper custody, even although there be no evidence of the handwriting or authorship of such entries; correspondence between relatives; recitals in deeds; descriptions in wills; inscriptions on tombstones, rings, monuments, or coffin plates; charts of pedigrees made or adopted by deceased members of the family, etc., have severally been held receivable in evidence for this purpose.
- 4. The next exception is that ancient documents purporting to constitute part of, or at least to have been executed contemporaneously with, the transactions to which they relate, are receivable as evidence of ancient possession, in favor of those claiming under them, and even against others who are neither parties nor privies to

them. The document must, however, be shown to have come from the proper custody, i. e. to have been found in a place in which, and under the care of persons with whom, it might naturally and reasonably be expected to be found.

- 5. Declarations made by deceased persons against their own interest are receivable in evidence in proceedings between third parties, provided such declarations were made against proprietary or pecuniary interest, and do not derogate from the title of third parties; e. g. a declaration made by a deceased tenant is not admissible if it derogates from the title of the reversioner.
- 6. Allied to these are declarations in the regular course of business, office, or employment, by deceased persons, who had a personal knowledge of the facts, and no interest in stating an untruth. But the rule as to the admission of such evidence is confined strictly to the particular thing which it was the duty of the person to do; and, unlike a statement against interest, does not extend to collateral matters, however closely connected with that thing. This class of declarations must also have been made contemporaneously with the acts to which they relate. [The leading case upon this exception is Price v. Lord Torrington, 1 Smith's Lead. Cas.]
- 7. The civil law, and the laws of some foreign countries, receive the books of tradesmen, made or purporting to be made by them in the regular course of business, as evidence to prove a debt against a customer or alleged customer; and such books were at one time receivable as evidence in England. But though not themselves admissible as evidence, almost all the advantage derivable from tradesmen's books, with little or none of their danger, is obtained under the law as it now stands. For not only may the tradesman appear as a witness, and use his books as memoranda to refresh his memory, with respect to the goods supplied, but those books are always available as "indicative" evidence; and, especially in the event of the bankruptcy of the tradesman, they are often found of immense value to himself or those who represent him.
- 8. Books of a deceased incumbent, rector or vicar, containing receipts and payments by him relative to the living, have frequently been held receivable in evidence for his successors. This has been considered anomalous.

9. The last exception to this rule is that of declarations made by persons under the conviction of their impending death. The circumstances under which such declarations are made may fairly be assumed to afford a guaranty for their truth, at least equal to that of an oath taken in a court of justice. Hence the dying declarations of a child of tender years will be rejected, unless he appears to have had that degree of religious knowledge which would render his evidence receivable; as likewise will those of an adult whose character shows him to have been a person not likely to be affected with a religious sense of his approaching dissolution.

### CHAPTER V.

EVIDENCE AFFORDED BY THE WORDS OR ACTS OF OTHER PERSONS.

"Res inter alios acta alteri nocere non debet." No person is to be affected by the words or acts of others, unless he is connected with them, either personally, or by those whom he represents or by whom he is represented. The expression "inter alios" does not mean that the act must be the act of more than one person. Nor does it make any difference that the act was done or confirmed by oath.

There is this point of resemblance between second-hand evidence and res inter alios acta, that the latter, like the former, must not be understood as excluding proof of res gestæ. The true meaning of the rule is simply this, that a party is not to be affected by what is done behind his back. Thus, if the question between plaintiff and defendant were, whether the former had paid a sum of money to D.; a receipt by D., acknowledging payment to him by the plaintiff of the money in question, would not, per se, be evidence of such payment as against the defendant, it being res inter alios acta; and yet it would be admissible as part of the res gestæ for the purpose of proving such payment. So, when the matter in issue consists of an act which is separable from the person of the accused, who is nevertheless

accountable for it, proof may be given of that act before he is connected with it by evidence. An illustration is afforded by prosecutions for conspiracy, where it is a settled rule that general evidence may be given to prove the existence of a conspiracy, before the accused is shown to be connected with it; for here the corpus delicti is the conspiracy, and the participation of the accused is an independent matter, which may or may not exist. The rule that the acts and declarations of conspirators are evidence against their fellows, rests partly on this principle and partly on the law of principal and agent. The following summary of the practice is fully supported by authority. "Where several persons are proved to have combined together for the same illegal purpose, any act done by one of the party, in pursuance of the original concerted plan, and with reference to the common object, is in contemplation of law the act of the whole party; and therefore the proof of such act would be evidence against any of the others who were engaged in the same conspiracy; and, further, any declarations made by one of the party at the time of doing such illegal act seem not only to be evidence against himself, as tending to determine the quality of the act, but to be evidence also against the rest of the party, who are as much responsible as if they had themselves done the act. But what one of the party may have been heard to say at some other time, as to the share which some of the others had in the execution of the common design, or as to the object of the conspiracy. cannot, it is conceived, be admitted as evidence to affect them on their trial for the same offence. And, in general, proof of concert and connection must be given before evidence is admissible of the acts or declarations of any person not in the presence of the pris-It is for the court to judge whether such connection has been sufficiently established; but when that has been done, the doctrine applies that each party is an agent for the others, and that an act done by one in furtherance of the unlawful design is in law the act of all, and that a declaration made by one of the parties at the time of doing such an act is evidence against the others."

There are exceptions to this rule. Thus, although in general strangers are not bound by and cannot take advantage of estoppels, yet it is otherwise when the estoppel runs to the disability or legitimation of the person. So, a judgment in rem, in the Exchequer, is

conclusive against all the world. The admissibility in evidence of many documents of a public and quasi public nature is at variance with this principle.

## CHAPTER VI.

#### OPINION EVIDENCE.

THE use of witnesses being to inform the tribunal respecting facts, their opinions are not in general receivable as evidence. The meaning of the rule is, simply, that questions shall not be put to a witness which, by substituting his judgment for theirs, virtually put him in the place of the jury.

The rule is subject to the following exceptions: -

1. On questions of science, skill, trade, and the like, persons conversant with the subject matter—called "experts"—are permitted to give their opinions in evidence. But where scientific men are called as witnesses, they cannot give their opinions as to the general merits of the cause, but only their opinions upon the facts proved.

The weight due to this, as well as to every other kind of evidence, is to be determined by the tribunal; which should form its own judgment on the matters before it, and is not concluded by that of any witness, however highly qualified or respectable.

2. Another class of exceptions exists where the judgment or opinion of a witness, on some question material to be considered by the tribunal, is formed on complex facts, which from their nature it would be impossible to bring before it. Thus, the identification by a witness of a person or thing is necessarily an exercise of his judgment. So, the state of an unproducible portion of real evidence—as, for instance, the appearance of a building, or of a public document which the law will not allow to be brought from its repository—may be explained by a term expressing a complex idea; e. g. that it looked old, decayed, or fresh, was in good or bad condition, etc. So also may the emotions or feelings of a party whose psychological condition is in question: thus, a witness may state whether, on a certain occasion, he looked

pleased, excited, confused, agitated, frightened, or the like. To this head also belongs the proof of handwriting, ex visu scriptionis and ex scriptis olim visis. And it is on this principle that testimony to character is received. In all cases, of course, the grounds on which the judgment of the witness is formed may be inquired into on cross-examination.

## CHAPTER VII.

#### SELF-REGARDING EVIDENCE.

#### SECTION I.

Self-regarding Evidence in General.

In the preceding chapters we have shown the general nature of those rules by which evidence is rejected, for want either of originality or of proximity. The present will be devoted to that species of evidence, for or against a party, which is afforded by the language or demeanor of himself, or of those whom he represents, or of those who represent him. All such evidence we purpose to designate by the expression "self-regarding." When in favor of the party supplying it, the evidence may be said to be "self-serving"; when otherwise, "self-harming."

The rule of law with respect to self-regarding evidence is, that when in the self-serving form it is not in general receivable; but that in the self-harming form it is, with few exceptions, receivable, and is usually considered proof of a very satisfactory kind.

The subject of self-serving evidence may be despatched in few words, and indeed has been substantially considered under the title, "Res inter alios acta alteri nocere non debet." There are, however, some exceptions to the rule excluding it. The first is, that, where part of a document or statement is used as self-harming evidence against a party, he has a right to have the whole of it laid before the jury, who may then consider and attach what weight they see fit to any self-serving statements it contains. Again, a person on his trial may, at least if not defended by

counsel, state matters in his defence which are not already in evidence, and which he is not in a condition to prove, and the jury may act on that statement if they deem it worthy of credit.

Belf-harming evidence may be supplied by words, writing, signs, or silence. Words addressed to others, and writing, are the most usual forms; but words uttered in soliloquy seem equally receivable; while of signs it has justly been said, "Acta exteriora indicant interiora secreta." So of silence, "Qui tacet, consentire videtur," — a maxim which must be taken with considerable limitation. The principal application of this maxim is in criminal cases, where a person charged with having committed an offence makes no reply.

As to the different kinds of self-harming statements. In the first place they are either "judicial" or "extra-judicial,"—according as they are made in the course of a judicial proceeding, or under any other circumstances.

- 2. Self-harming statements in civil cases are usually called "admissions," and those in criminal cases "confessions."
- 3. Self-harming statements are divisible into "plenary" and "not plenary." A "plenary" confession is when a self-disserving statement is such as, if believed, to be conclusive against the person making it, at least on the physical facts of the matter to which it relates; as where a party accused of murder says, "I murdered," or "I killed," the deceased. In such cases the proof is in the nature of direct evidence. A confession "not plenary" is where the truth of the self-disserving statement is not absolutely inconsistent with the existence of a state of facts different from that which it indicates; but only gives rise to a presumptive inference of their truth, and is therefore in the nature of circumstantial evidence. A is found murdered, or the goods of B are proved to have been stolen, and the accused or suspected person says, "I am very sorry that I ever had anything to do with A.," or "that I ever meddled with the goods of B."

Although a party may admit the contents of a document, he could not, before the Common Law Procedure Act, 1854 (17 & 18 Vict., c. 125), by admitting the execution of a deed, (except when such admission was made for the purpose of a cause in court,) dispense with proof of it by the attesting witness.

So far as its admissibility in evidence is concerned, it is in general immaterial to whom a self-harming statement is made. But if coming under the head of what the law recognizes as confidential communication, it will not be received in evidence; neither will it, if embodied in a communication made "without prejudice," the object of such being to buy peace, and settle disputes by compromise instead of by legal proceedings.

Self-harming statements, etc., made by a party when his mind is not in its natural state, ought, in general, to be received as evidence, but his state of mind should be taken into consideration by the jury as an infirmative circumstance. Thus, a confession made by a prisoner when drunk has been received. What a person has been heard to say while talking in his sleep seems not to be legal evidence against him, however valuable it may be as indicative evidence; for here the suspension of the faculty of judgment may fairly be presumed complete. The acts of persons of unsound mind, also, are not in general binding.

A party is not in general prejudiced by self-harming statements made under a mistake of fact. But it is very different when the confession is made under a mistake of law. Neither is a party to be prejudiced by a confessio juris, although this must be understood with reference to a confession of law not involved with facts; for the confession of a matter compounded of law and fact is receivable.

Self-harming statements may in general be made, either by a party himself, or by those under whom he claims, or by his attorney or agent lawfully authorized. This of course implies that the party against whom the admission or confession is offered in evidence is of capacity to make such admission or confession.

#### SECTION II.

# Estoppels.

An estoppel seems to be when, in consequence of some previous act or statement to which he is either party or privy, a person is precluded from showing the existence of a particular state of facts; and is that species of presumptio

juris et de jure where the fact presumed is taken to be true, not as against all the world, but as against a particular party, and that only by reason of some act done.

The most important rules respecting estoppels are the

following : -

- 1. Estoppels must be mutual or reciprocal, i. e. binding both parties. But this does not hold universally; for instance, a feoffor, donor, lessor, etc. by deed poll will be estopped by it, although there is no estoppel against the feoffee, etc.
- 2. In general, estoppels affect only the parties and privies to the act working the estoppel; strangers are not bound by them, and cannot take advantage of them.
- 3. It seems that conflicting estoppels neutralize each other, or, as our books express it, "Estoppel against estoppel doth put the matter at large."

Estoppels are of three kinds: 1. By matter of record.
2. By deed. 3. By matter in pais.

1. Estoppels by matter of record; as letters patent, fine, recovery, pleading, etc. The most important form of this is estoppel by judgment, which will be considered under the head of resjudicata.

With respect to estoppels by pleading. A party who does not plead within the time required by law is taken to confess that his adversary is entitled to judgment. So a party may, by resorting to one kind of plea, be concluded from afterwards availing himself of another.

As to the effect of admissions, express or implied, in pleadings, the following rule, which certainly savors of technicality, is laid down in the books, viz.: that the material facts alleged by one party, which are directly admitted by the opposite party, or indirectly admitted by taking a traverse on some other facts, cannot be again litigated between the same parties, and are conclusive evidence between them, but only if the traverse is found against the party making it.

2. Estoppels by deed. "A deed," says Mr. Justice Blackstone, "is the most solemn and authentic act that a man can possibly perform, with relation to the disposal of his property; and therefore a man shall always be estopped by his own deed, or not permitted to aver or prove anything in contradiction to what he has once so solemnly and deliberately avowed." This rule, however, must be understood to apply only where an action is brought to enforce rights arising out of the deed, and not collateral to it; and it does not include the case of a mere general recital in a deed, such general recital not having the effect of an estoppel. It is only a special recital of a particular fact in a deed which will estop.

3. Estoppels by matter in pais. "Where one by his words or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring, against the latter, a different state of things as existing at the same time."

Before dismissing the subject of estoppel, we would direct attention to the question, whether the maxim of the civil law, "Allegans suam turpitudinem [suum crimen] non est audiendus," is, or ever was, a maxim of the common law.

The modern authorities completely negative the existence of any such rule, so far as witnesses are concerned. It is now undoubted law, that a witness, although not always bound to answer them, may be asked questions tending to criminate, injure, or degrade him. So, it is the constant practice in criminal cases to receive the evidence of accomplices, who depose to their own guilt as well as to that of the accused; and it is not even indispensable, although customary and advisable, that some material part of the story told by the accomplice should be corroborated by untainted evidence.

## SECTION III.

Self-harming Statements in Criminal Cases.

## Subsection I.

# Estoppels in Criminal Cases.

THE first and most important is the estoppel by judicial confession. A confession of guilt, made by an accused person to a judicial tribunal having jurisdiction to condemn or acquit him, is

sufficient to found a conviction, even where it may be followed by sentence of death; such confession being deliberately made, under the deepest solemnities, oftentimes with the advice of counsel, and always under the protecting caution and oversight of the judge. Still, if the confession appears incredible, or any illegal inducement to confess has been held out to the accused, or if he appears to have any object in making a false confession, or if the confession appears to be made under any sort of delusion, or through fear and simplicity, the court ought not to receive it. So, if the offence charged is one of the class denominated "facti permanentis," and no other indication of a corpus delicti can be found. In ordinary practice a plea of guilty is never recorded by English judges, at least in serious cases, without first solemnly warning the accused that such plea will not entitle him either to mercy or a mitigated sentence, and freely offering him leave to retract it and plead not guilty.

- 2. An accused person must plead the different kinds of pleas in their regular order: by pleading in bar, he loses his right to plead in abatement, etc.
- 3. An accused person may be estopped by various collateral matters which do not appear on record. Thus he cannot challenge a juror after he has been sworn, unless it be for cause arising afterwards. If he challenges a juror for cause, he must show all his causes together.

## SUBSECTION II.

The Admissibility and Effect of Extra-judicial Self-criminative
Statements.

Self-harming evidence is not always receivable in oriminal cases, as it is in civil. There is this condition precedent to its admissibility, that the party against whom it is adduced must have supplied it voluntarily, or at least freely. Every confession or criminative statement ought to be rejected, which has been extracted by physical torture, coercion, or duress of imprisonment; or which has been made after any inducement to confess has been held out to the accused, by, or with the sanction, express or implied, of any person having lawful authority, judicial or otherwise, over the charge against him, or over his person as connected

with that charge. But in order to have this effect, the inducement thus held out must be in the nature of a promise of favor or threat of punishment. If, therefore, it appears that the accused was urged to speak the truth on moral grounds only, the confession or criminative statement will be receivable; as it also will be, when the supposed influence of an illegal inducement to confess may fairly be presumed to have been dissipated before the confession, by a warning from a person in authority not to pay any attention to it.

With respect to the effect of extra-judicial confessions, or statements when received, the rule is clear, that, unless otherwise directed by statute, no such confession or statement, whether plenary or not plenary, whether made before a justice of the peace or other tribunal having only an inquisitorial jurisdiction in the matter, or made by deed or matter in pais, either amounts to an estoppel, or has any conclusive effect against an accused person, or is entitled to any weight beyond that which the jury in their conscience assign to it.

#### SUBSECTION III.

Infirmative Hypotheses affecting Self-criminative Evidence.

In the mediaval tribunals of the civil and canon laws, the inquisitorial principle was essentially dominant. And this has so far survived, that in many Continental tribunals at the present day every criminal trial commences with a rigorous interrogation of the accused by the judge or other presiding officer. The common law of England proceeds in a way quite the reverse of all this. - holding that the onus of proving the guilt of the accused lies on the accuser, and that no person is bound to criminate himself. It has therefore always abstained from physical torture, and taken great care, perhaps too great care, to prevent suspected persons from being terrified, coaxed, cajoled, or entrapped into criminative statements; and it not only prohibits judicial interrogation in the first instance, but, if the evidence against the accused fails in establishing a prima facie case against him, it will not even call on him for his defence. As, however, the introduction of judicial interrogation into this country has been warmly advocated by able jurists, we propose to examine briefly the

claims of the conflicting systems. [The student should read at length §§ 556-558. Lack of space prevents their insertion here.]

All false self-criminative statements are divisible into two classes, —those which are the result of mistake on the part of the confessionalist, and those which are made by him in expectation of benefit. And the former are twofold, — mistakes of fact and mistakes of law.

First, of mistakes of fact. A man may believe himself guilty of a crime, either when none has been committed, or where a crime has been committed, but by another person. Mental aberration is the obvious origin of many such confessions. But the actors in a tragedy may be deceived by surrounding circumstances, as well as the spectators.

Next, as to mistakes of law. All confessions avowing delinquency in general terms are, more or less, confessiones juris; and this will in a great degree explain, what to unreflecting minds seems so anomalous, the caution exercised by British judges in receiving a plea of guilty.

In the other class of false self-criminative statements, the statement is known by the confessionalist to be false, and is made in expectation of some real or supposed benefit to himself or others, or for the purpose of injuring others. It is obviously impossible to enumerate the motives which may sway the minds of men to make false statements of this kind. [The author, in §§ 563 to 572, proceeds to enumerate and discuss the most obvious of the motives for making false self-criminative statements. For details see the original work.]

Extra-judicial confessorial statements, especially when not plenary, are subject to additional infirmative hypotheses. These are mendacity in the report, misinterpretation of the language used, and incompleteness of the statement.

1. "Mendacity." The supposed confessorial statement may be either wholly or in part a fabrication of the deposing witnesses.

2. "Misinterpretation." No act or word of man, however innocent or even laudable, is exempt from this. 3. "Incompleteness"; i. e. where words, though not misunderstood in themselves, convey a false impression, for want of some explanation which the speaker either neglected to give, or was prevented by interruption

from giving, or which has been lost in consequence of the deafness or inattention of the hearers.

As to the force and effect of "non-responsion," or silence under accusation, "evasive responsion," and "false responsion."

"Non-responsion." When a man is interrogated as to his having committed a crime, or when a statement that he has committed a crime is made in his presence, and he makes neither reply nor remark, the inference naturally arises that the imputation is well founded, or he would have repelled it. strongly such a circumstance may tell against suspected persons in general, there are many considerations against investing it with conclusive force. 1. The party, owing to deafness, or other cause, may not have heard the question or observation; or, even if he has, may not have understood it as conveying an · imputation upon him. 2. Supposing the accused to have heard the question or observation, and understood it as conveying an imputation upon him, his momentary silence may be caused by impediment of utterance, or a feeling of surprise at the imputation. 3. When this kind of evidence is in an extra-judicial form, the transaction comes to the tribunal through the testimony of witnesses, who may either have misunderstood, or who wilfully misreport it. 4. Assuming the matter correctly reported, "the strength of it" (i. e. the inference of guilt from evidence like that we are now considering) "depends principally upon two circumstances: the strength of the appearances (understand, the strength they may naturally be supposed to possess, in the point of view in which they present themselves to the party interrogated), - the strength of the appearances, and the quality of the interrogator."

Connected with the subject of non-responsion is that of incomplete or "evasive responsion"; i. e. where a man is interrogated as to his having committed a crime, or when a statement that he has committed a crime is made in his presence, and he either evades the question, or, while denying his guilt, refuses to show his innocence, or to answer or explain any circumstances which are brought forward against him as criminative or suspicious. The inference of guilt from such conduct is weakened by the following additional

considerations. 1. A man ever so innocent cannot always explain all the circumstances which press against him. 2. In many cases an accused or suspected person can only explain particular circumstances by criminating other individuals whom he is unwilling to expose, or disclosing matters which, though unconnected with the charge, he is anxious to conceal. Sometimes, too, though blameless in the actual instance, he could only prove himself so by showing that he was guilty of some other offence. 3. Where a prosecution is altogether groundless, — the result of conspiracy, or likely to be supported by perjured testimony, — it is often good policy on the part of its intended victim not to disclose his defence until it is judicially demanded of him on his trial.

"False responsion," however, is a criminative fact very much stronger than either of the former. The infirmative hypotheses here seem to be, -1. The possibility of extra-judicial conversations having been misunderstood or misreported. 2. As innocent persons, under the influence of fear, occasionally resort to false evidence in their defence, false statements may arise from the same cause.

## CHAPTER VIII.

EVIDENCE REJECTED ON GROUNDS OF PUBLIC POLICY.

The expression, "evidence rejected on grounds of public policy," is here used in a limited sense; as signifying that principle by which evidence, receivable so far as relevancy to the matters in dispute is considered, is rejected on the ground that, from its reception, some collateral evil would ensue to third parties or to society.

One species of this has been already treated of, under the head of witnesses, who are privileged from answering questions having a tendency to criminate, or to expose them to penalty or forfeiture, or even, in some cases, merely to degrade them. But, taking a general view of the subject, the matters thus excluded on grounds of public policy may be divided into political, judicial, professional, and social.

- I. Under the first come all secrets of state, such as state papers; and all communications between government and its officers;—the privilege in such cases not being that of the person who is in possession of the secret, but that of the public, as a trustee for whom the secret has been intrusted to him.
- II. Judicial. The principal instance of this is in the case of jurymen. First, grand jurors cannot, at least in general, be questioned as to what took place among or before them, while acting as such.

Secondly, the evidence of petty jurors is not receivable to prove their own misbehavior, or that a verdict which they have delivered was given through mistake.

- III. Professional.—1. At the head of these stand communications made by a party to his legal advisers, i. e. counsel, attorney, etc.; and this includes all media of communication between them, such as clerks, interpreters, or agents. But the privilege does not extend to matters of fact, which the attorney knows by any other means than confidential communication with his client, though if he had not been employed as attorney he probably would not have known them. And the privilege is not the privilege of the professional man, but of the client, who may waive it or not, as he pleases. And his refusal to waive it raises no presumption against him.
- 2. Communications to a medical man, even in the strictest professional confidence, have been held not protected from disclosure, a rule harsh in itself, of questionable policy, and at variance with the practice in France, and the statute law in some of the United States of America [New York, Missouri, Michigan, Wisconsin, and Iowa].
- 3. Whether communications made to spiritual advisers are, or ought to be, protected from disclosure in courts of justice, presents a question of some difficulty. It is commonly thought that the decisions of the judges in the cases of R. v. Gilham, and R. v. Wild, added to some others, have resolved this question in the negative; and the practice is in accordance with that notion.
- IV. Social. The applications of this principle to social life afe few. The principal instance is in the case of communications be-

tween husband and wife. Such, says Professor Greenleaf,1 "belong to the class of privileged communications, and are therefore protected, independently of the ground of interest and identity, which precludes the parties from testifying for or against each other. The happiness of the married state requires that there should be the most unlimited confidence between husband and wife; and this confidence the law secures by providing that it shall be kept forever inviolable, — that nothing shall be extracted from the bosom of the wife which was confided there by the husband. Therefore, after the parties are separated, whether it be by divorce, or by the death of the husband, the wife is still precluded from disclosing any conversations with him; though she may be admitted to testify to facts which came to her knowledge by means equally accessible to any person not standing in that relation."

Secrets disclosed in the ordinary course of business, or the confidence of friendship, are not protected.

Courts of justice possess an inherent power of rejecting evidence, which is tendered for the purpose of creating expense, or causing vexation or delay. Such malpractices are calculated to impede the administration of the law, as well as to injure the opposite party.

It has been said that the law excludes, on public grounds, evidence which is indecent or offensive to public morals, or injurious to the feelings of third persons. But not only is there no direct authority for such a proposition, but there is authority to the contrary.

## CHAPTER IX.

#### AUTHORITY OF RES JUDICATA.

The maxim, "Res judicata pro veritate accipitur," is a branch of the more general one, "Interest reipublicse ut sit finis litium."

In order to have the effect of res judicata, the decision must be that of a court of competent jurisdiction, concur-

1 1 Greenl. Evid. § 254, 7th ed.

rent or exclusive. The decisions of such tribunals are conclusive until reversed; but no decision is final, unless it be pronounced by a tribunal from which there lies no appeal, or unless the parties have acquiesced in the decision, or the time limited by law for appealing has elapsed. Moreover, the conclusive effect is confined to the point actually decided; and does not extend to any matter which came collaterally in question. It does, however, extend to any matter which it was necessary to decide, and which was actually decided, as the groundwork of the decision itself, though not then directly the point at issue.

Such a judgment, with respect to any third person, who was neither party nor privy to the proceeding in which it was pronounced, is only res inter alios judicata; and hence the rule, that it does not bind, and is not in general evidence against, any one who was not such party or privy.

But the judgment of a tribunal of competent jurisdiction may be null and void in itself, in respect of what is contained in it. 1. When the object of the decision it pronounces is uncertain; e. g. a judgment condemning the defendant to pay the plaintiff what he owes him would be void. though it would be sufficient if it condemned the defendant to pay what the plaintiff demanded of him, and the cause of demand appeared on the record of the proceedings. 2. When the object of the adjudication is anything impossible. 3. When a judgment pronounces anything which is expressly contrary to the law; i. e. if it declares that the law ought not to be observed: if it merely decides that the case in question does not fall within the law, though in truth it does so, the judgment is not null, it is only improper, and consequently can only be avoided by the ordinary course of appeal. 4. When a judgment contains inconsistent and contradictory dispositions. 5. When a judgment pronounces on what is not in demand.

The same principles apply to other things which partake of the nature of judgments. Thus, a verdict that finds matter uncertainly or ambiguously is insufficient; and the same holds when it is inconsistent.

Awards. — It is a principle that awards must be certain; and

if an award contains inconsistent provisions, or directs what is impossible, or what is illegal, it cannot be enforced by action, and may be set aside on motion.

First, in order to exclude a party whose demand has been dismissed from making a fresh demand, on the ground that the matter is res judicata, the thing demanded must be the same. But this must not be understood too literally. For instance, although the flock which the plaintiff demands now does not consist of the same sheep as it did at the time of the former demand, the demand is held to be for the same thing, and therefore is not receivable. And so, a party is held to demand the same thing when he demands anything which forms a part of it. But, secondly, in order that the maxim res judicata shall apply, there must be "eadem conditio personarum." And therefore, as we have seen, if the person whom it is sought to affect by a judgment was neither party nor privy to the proceedings in which it was given, it is not in general even receivable in evidence against him. So, a judgment against a party in a criminal case is not evidence against him, in a civil suit, even of the fact on which the conviction must have proceeded. Nor is a judgment of acquittal evidence in his favor; for the parties are not the same.

An important exception to this rule exists in the case of judgments in rem, i. e. adjudications pronounced upon the *status* of some particular subject matter, by a tribunal having competent authority for that purpose. Such judgments the law has, from motives of policy and general convenience, invested with a conclusive effect against all the world.

Conclusive judgments are a species of estoppels; seeing that they are given in a matter in which the person against whom they are offered as evidence has had, either really or constructively, an opportunity of being heard, and disputing the case of the other side. When judgment has been obtained for a debt, no other action can be maintained upon it while the judgment is in force. Like other estoppels by matter of record, and estoppels by deed, judgments, in order to have a conclusive effect, must be pleaded if there be opportunity; otherwise they are only cogent evidence for the jury.

The general maxims of law, "Dolus et fraus nemini patrocinentur," "Jus et fraus nunquam cohabitant," "Qui fraudem fit frustra agit," apply to the decisions of tribunals. Although it is not permitted to show that the court was mistaken, it may be shown that it was misled. Fraud is an extrinsic collateral act, which vitiates the most solemn proceedings of courts of justice. This principle applies to every species of judgment; to judgments of courts of exclusive jurisdiction; to judgments in rem; to judgments of foreign tribunals; and even to judgments of the House of Lords.

It is perhaps needless to add, that a supposed judicial record offered in evidence may be shown to be a forgery.

# CHAPTER X.

#### PLURALITY OF WITNESSES.

The quantity of legitimate evidence required for judicial decision. In general no particular number of instruments of evidence is necessary for proof or disproof; the testimony of a single witness, relevant for proof of the issue in the judgment of the judge, and credible in that of the jury, is a sufficient basis for decision, both in civil and criminal cases. And, as a corollary from this, when there is conflicting evidence, the jury must determine the degree of credit to be given to each of the witnesses; for the testimony of one witness may, in many cases, be more trustworthy than the opposing testimony of many.

- I. Exceptions at common law.
- 1. Prosecutions for perjury. The rule requiring two witnesses in indictments for perjury applies only to the proof of the falsity of the matter sworn to by the defendant: all preliminary or collateral matters, such as the jurisdiction and sitting of the court, the fact of the defendant having taken the oath, together with the evidence he gave, etc., may be proved in the usual way.

It is not easy to define the precise amount of evidence required from each of the witnesses or proofs in such cases. In R. v. Parker, <sup>1</sup> Tindal, C. J. thus laid down the rule: "With regard to the crime of perjury, the law says, that, where a person is charged with that offence, it is not enough to disprove what he has sworn by the oath of one other witness; and unless there are two oaths, or there be some documentary evidence, or some admission, or some circumstances to supply the place of a second witness, it is not enough." Probably the soundest view of this subject is that stated by Erle, C. J., in R. v. Shaw; <sup>2</sup> viz. that the degree of corroborative evidence requisite must be a matter for the opinion of the tribunal which tries the case, which must see that it deserves the name of corroborative evidence.

Where the alleged perjury consists in the defendant having sworn contrary to what he had previously sworn on the same subject, the case is not within the rule we have been considering; and the defendant may be convicted simply upon proof of the contradictory evidence given by him on the two occasions.

- 2. The next exception is in the proof of wills attested by more than one witness, in the manner formerly required by the Statute of Frauds, 29 Car. II., c. 3, s. 5, and now by the 7 Will. IV. & 1 Vict., c. 26, and 15 & 16 Vict., c. 24. The practice under both these statutes is thus stated in Taylor on Evidence (7th ed.), § 1854: "Where an instrument requiring attestation is subscribed by several witnesses, it is only necessary to call one of them; excepting in the case of wills rolating to real estate, with respect to which it has for many years been the practice of courts of equity, and is now the practice of all the courts, to require that all the witnesses who are in England, and capable of being called, should be examined. It used to be said that all the subscribing witnesses must be called in order to satisfy the conscience of the Lord Chancellor."
- 3. Another exception to this rule was in the "trial by witnesses," or, as our old lawyers expressed it, "trial by proofs,"—expressions used in our books to designate a few cases which were tried by the judges instead of a jury. It is not easy to fix precisely what these cases were. Such a case was where, on a writ of dower, the tenant pleaded that the husband of the demandant was still living.
- 4. There seems to be some difference among the authorities as to whether two witnesses were required on a claim of villenage or niefty. If such

<sup>&</sup>lt;sup>1</sup> C. & Marsh. 646.

were the rule, it was a good one in favorem libertatis; but it is needless to pursue the inquiry at the present day.

II. Statutory exceptions. Of these the most important and remarkable is found in the practice on trials for high treason and misprision of treason. The better opinion and weight of authority are strongly in favor of the position, that at the common law a single witness was sufficient in high treason, and a fortiori in petty treason or misprision of treason.

The rule requiring two witnesses in treason only applies to the proof of the overt acts of treason charged in the indictment: any collateral matters may be proved as at common law; such as that the accused is a subject of the British Crown, and the like.

<sup>&</sup>lt;sup>2</sup> [Section 3 of Article III. of the Constitution of the United States provides that "No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court." The stat. 7 & 8 Will. III., c. 3, s. 2, is very similar to the above quoted constitutional provision.

# BOOK IV.

# OBSERVATIONS ON FORENSIC PRACTICE, AND RULES FOR EXAMINATION OF WITNESSES.

# PART I.

# OBSERVATIONS ON FORENSIC PRACTICE.

The rules of evidence, especially such as relate to evidence in causa, are rules of law, which a court or judge has no more right to disregard or suspend than any other part of the common or statute law of the land. Those which regulate forensic practice are less inflexible; for although the mode of receiving and extracting evidence is governed by established rules, a discretionary power of relaxing these on proper occasions is vested in the tribunal; and indeed it is obvious that an unbending adherence, under all circumstances, to rules which are the mere forma et figura judicii, would impede rather than advance the ends of justice.

# CHAPTER I.

#### PROCEEDINGS PREVIOUS TO TRIAL.

THE common law laid down as a maxim, "Nemo tenetur armare adversarium suum contra se," and, in furtherance of this principle, it generally allowed litigant parties to conceal from each other, up to the time of trial, the evidence on which they meant to rely, and would not compel either of them to supply the other with any evidence, parol or otherwise, to assist him in the

the party who began may give proof of a rebutting case; his adversary has then a special reply on the new evidence thus adduced, and the opener has a general reply on the whole case.

The party against whom real or documentary evidence is adduced has a right to inspect it; and such evidence can be read to or laid before the jury only if no valid objection to it appears. Every witness called is first examined by the party calling him. and this is denominated his "examination in chief." If an objection is made to his competency, he is interrogated as to the necessary facts, and this is called examination on the voir dire. The party against whom any witness is examined has a right to "cross-examine" him: after which the party by whom he is called may "re-examine" him, but only as to matters arising out of the cross-examination. The court and jury may also put questions to the witnesses, and inspect all media of proof adduced by either side. The court, generally speaking, is not only not bound by the rules of practice relative to the manner of questioning witnesses, and the order of receiving proofs, but may in its discretion dispense with them in favor of parties or counsel. During the whole course of the trial, the judge determines all questions of law and practice which arise; and if the admissibility of a piece of evidence depends on any disputed fact, the judge must determine that fact, and for this purpose go into proofs, if necessary.

The common law right of a party to appear by counsel, when that right is accorded to the other side, was long subject to a remarkable exception, i. e. in cases of persons indicted or impeached for treason or felony. It was otherwise in prosecutions for misdemeanor, as also in appeals of felony; and even on indictments or impeachments for treason or felony, the exception was confined to cases where the accused pleaded the general issue, and did not extend to preliminary or collateral matters. [Now, both in England and the United States, every person accused of any crime is entitled as a matter of right to appear and be heard by counsel.]

II. Amongst the principal incidents of a trial, the first which requires particular notice is the practice of ordering witnesses out of court. When concert or collusion among witnesses is suspected, or there is reason to apprehend that any of them will be influenced by the statements of counsel, or the evidence given

by other witnesses, the ends of justice require that they be examined apart; and the court will, proprio motu, or on the application of either party, order all the witnesses, except the one under examination, to leave court. The better opinion seems to be, that this is not demandable ex debito justitie; and there may be cases where it would be judicious to refuse it. It is said that the rule does not extend to the parties in the cause; nor, at least in general, to the solicitors engaged in it. A witness who disobeys such an order is guilty of contempt; but the judge cannot refuse to hear his evidence, although the circumstance is matter of remark to the jury. In order to prevent communication, in such cases, between witnesses who have been examined and those awaiting examination, it is a rule that the former must remain in court until the latter are examined.

2. Next, with respect to the order of beginning, or ordo incipiendi. This is known in practice as the "right to begin." There are few heads of practice on which a larger number of irreconcilable decisions have taken place. In one sense of the word, the plaintiff always begins; for, without a single exception, the pleadings are opened by him or his counsel, and never by the defendant or his counsel. But, as it is agreed on all hands that the order of proving depends on the burden of proof, if it appears on the statement of the pleadings, or whatever is analogous thereto. that the plaintiff has nothing to prove. - that the defendant has admitted every fact alleged, and takes on himself to prove something which will defeat the plaintiff's claim. — he ought to be allowed to begin, as the burden of proof then lies on him. authorities on this subject present almost a chaos. Thus much only is certain, that if the onus of proving the issues, or any one of the issues, however numerous they may be, lies on the plaintiff, he is entitled to begin; and it seems that, if the onus of proving all the issues lies on the defendant, and the damages which the plaintiff could legally recover are either nominal or mere matter of computation, here also the defendant may begin. But the difficulty is, where the burden of proving the issue, or all the issues if more than one, lies on the defendant, and the onus of proving the amount of damage lies on the plaintiff. A series of cases (not an unbroken series, for there were several authorities the other way), concluding with that of Cotton v. James, in 1829, established the position that the onus of proving damages made no difference, and that under such circumstances the defendant ought to begin.

A rule on the subject was made by the judges, and applied in the cases arising in 1833 and since that time, that "in actions for libel, slander, and injuries to the person, the plaintiff shall begin, although the affirmative issue is on defendant"; and it was stated that the rule was not at all intended to introduce a new practice, but was declaratory or restitutive of the old.

It is now settled, that, where the ruling of the judge with reference to the right to begin is erroneous in the judgment of the court in banc, and "clear and manifest wrong" has resulted from that ruling, a new trial will be granted by the court, not as matter of right, but as matter of judgment.

The right to begin is an advantage to a party who has a strong case and good evidence, as it enables him to make the first impression on the tribunal; and if evidence is adduced by the opposite side, it entitles him to reply, thus giving him the last word. But if the case of a party be a weak one,—if he has only slight evidence, or perhaps none at all, to adduce in support of it,—and goes to trial on the chance (if defendant) of the plaintiff being nonsuited, or that the case of the opposite party may break down through its own intrinsic weakness, or trusting to the effect of an address to the jury, the fact of his having to begin might prove instantly fatal to his cause.

3. We have already referred to the rule of practice which prohibits counsel, or the parties in civil cases, and, in accordance with a recent rule, the counsel for accused parties in criminal cases, from stating any facts to the jury which they do not intend offering evidence to prove. This must not, however, be understood too literally. A counsel or party has a right to allude to any facts of which the court takes judicial cognizance, or the notoriety of which dispenses with proof. But more difficulty arises with respect to historical facts. A public and general history is receivable in evidence to prove a matter relating to the kingdom at large. But a history is not receivable to prove a private right or

particular custom. It has also been held that counsel or a party at a trial may refer to matters of general history, provided the license be exercised with prudence; but cannot refer to particular books of history, or read particular passages from them, to prove any fact relevant to the cause. Also, that works of standard authority in literature may, provided the privilege be not abused, be referred to by counsel or a party at a trial, in order to show the general course of composition, explain the sense in which words are used, and matters of a like nature; but that they cannot be resorted to for the purpose of proving facts relevant to the cause.

4. The chief rule of practice relative to the interrogation of witnesses is that which prohibits "leading questions"; i. e. questions which, directly or indirectly, suggest to the witness the answer he is to give. The rule is, that on material points a party must not lead his own witnesses, but may lead those of his adversary; in other words, that leading questions are allowed in cross-examination, but not in examination in chief. On all matters, however, which are merely introductory, and form no part of the substance of the inquiry, it is both allowable and proper for a party to lead his own witnesses, as otherwise much time would be wasted to no purpose. It is sometimes said, that the test of a leading question is whether an answer to it by "Yes" or "No" would be conclusive upon the matter in issue; but although all such questions undoubtedly come within the rule, it is by no means limited to them. Where "Yes" or "No" would be conclusive on any part of the issue, the question would be equally objectionable. So, leading questions ought not to be put when it is sought to prove material and proximate circumstances.

There are some exceptions to the rule against leading. 1. For the purpose of identifying persons or things, the attention of the witness may be directly pointed to them. 2. Where one witness is called to contradict another, as to expressions used by the latter, but which he denies having used, he may be asked directly, Did the other witness use such and such expressions?

3. Whenever circumstances show that a witness is either hostile to that party or unwilling to give evidence, the judge may in his discretion allow the rule to be relaxed.

4. The rule

will be relaxed where the inability of a witness to answer questions put in the regular way obviously arises from **defective memory**; or 5. From the **complicated nature of the matter** as to which he is interrogated.

- 5. One of the chief rules of evidence is, that no evidence ought to be received which does not bear, immediately or mediately, on the matters in dispute. As a corollary from this, all questions tending to raise collateral issues, and all evidence offered in support of such issues, ought to be rejected. In addition to counter proofs and cross-examination. there are three ways of throwing discredit on the testimony of an adversary's witness. 1. By giving evidence of his general bad character for veracity, i. e. the evidence of persons who depose that he is in their judgment unworthy of belief, even though on his oath. And here the inquiry must be limited to what they know of his general character, on which alone that judgment should be founded; particular facts cannot be gone into. 2. By showing that he has on former occasions made statements inconsistent with the evidence he has given. But this is limited to such evidence as is relevant to the cause: for a witness cannot be contradicted on collateral matters. 3. By proving misconduct connected with the proceedings, or other circumstances showing that he does not stand indifferent between the contending parties. Thus it may be proved that a witness has been bribed to give his evidence, or has offered bribes to others to give evidence for the party whom he favors, or that he has used expressions of animosity and revenge towards the party against whom he bears testimony, etc.
- 6. With respect to the right of a party to discredit his own witnesses. It is an established rule of the common law that a party shall not be allowed to give general evidence to discredit his own witness, i. e. general evidence that he is unworthy of belief on his oath. By calling the witness, a party represents him to the court as worthy of credit, or at least not so infamous as to be wholly unworthy of it. A party might, however, discredit his own witness collaterally, by adducing evidence to show that the evidence which he gave was untrue in fact.
  - 7. A power of adjournment of its proceedings by a

judicial tribunal in certain cases, exercised with due caution and discretion, is indispensable to the sound and complete administration of justice. As regards criminal cases, it is said that it is incident to a criminal trial that the court may, for sufficient reason, adjourn it. But this rule seems not to have been recognized in civil cases. [See Stat. 17 & 18 Vict., c. 125, s. 19.]

- 8. There are two ways of questioning the ruling of a court or judge, on matters of evidence in civil cases.

  1. By bill of exceptions founded on the Statute West. 2 (13 Edw. I.), c. 31, stat. 1: "Cum aliquis implacitatus coram aliquibus justiciariis, proponat exceptionem, et petat quod justiciarii eam allocent, quam si allocare noluerint, si ille, qui exceptionem proponet, scribat illam exceptionem et petat quod justiciarii apponant sigilla in testimonium, justiciarii sigilla sua apponant; et si unus apponere noluerit, apponat alius de societate." And if a judge refused to seal a bill of exceptions, the party might have a compulsory writ against him, commanding him to seal it if the fact alleged were truly stated; and if he returned that the fact was untruly stated, when the case was otherwise, an action would lie against him for making a false return. [Changed in England by Rule of the Supreme Court.]
- 2. The improper admission or rejection of evidence was also a ground for an application to the court in banc for a new trial. And this mode of proceeding was generally adopted in preference to that by bill of exceptions. But the court would often refuse a new trial, even where an undoubted error had been committed by the judge, if they thought that under all the circumstances justice had been done.

As to criminal cases. It is said that bills of exceptions do not lie in such cases, and they are certainly never seen in practice. But the Court of Queen's Bench will grant a new trial in certain cases of misdemeanor, though not in a case of felony. [In this country, motions for a new trial, settlement of bills of exceptions, and suing out of writs of error are common proceedings in criminal cases.] Formerly, when the judge before whom a criminal cause was tried in the Central Criminal Court, or on circuit, entertained a doubt on any point of law or evidence, he reserved the question for the consideration of the judges of the superior courts,

who heard it argued, and, if they thought the accused improperly convicted, recommended a pardon. But the judges sitting in this way had no jurisdiction as a court, and were only assessors to advise the judge by whom the matter was brought before them. By 11 & 12 Vict., c. 78, however, this was altered; and a regular tribunal, consisting of at least five judges, was constituted for the decision of all points reserved on criminal trials by any court of over and terminer, or jail delivery, or court of quarter sessions. But neither under the old practice nor under this statute have the parties to a criminal proceeding any compulsory means of reviewing the decision of the judge.

# PART II.

ELEMENTARY RULES FOR CONDUCTING THE EXAMINATION AND CROSS-EXAMINATION OF WITNESSES.

In what follows, the term "cross-examination" will be used in the sense of "examination ex adverso"; i. e. the interrogation by an advocate of a witness hostile to his cause, without reference to the form in which the witness comes before the court.

In dealing with examination ex adverso, we propose to consider separately the cases:—1. Where the evidence of the witness is false in toto. 2. Where a portion of it is true, but a false coloring is given by the witness to the whole transaction to which he deposes,—either by the suppression of some facts, or the addition of others, or both.

- I. 1. Of the former of these, the most obvious, though not the most usual case, is where the answers extracted show that the fact deposed to is physically impossible.
- 2. Cases like the above are, however, necessarily uncommon; in most instances, the exertions of the advocate must be directed to showing the improbability, or at most the moral impossibility, of the fact deposed. The story of Susannah and the Elders in the Apocrypha affords a very early and most admirable example. The

two false witnesses were examined out of the hearing of each other: on being asked under what sort of tree the criminal act was done, the first said "a mastic tree," the other "a holm tree." The most usual application of this is in detecting fabricated alibis. These seldom succeed if the witnesses are skilfully cross-examined out of the hearing of each other.

II. Falsehood in toto is far less common than misrepresentation. Under this head come. 1. Exaggeration, and 2. Evasion. Of the various resorts of evasion, the most obvious and ordinary are generality and indistinctness. "Dolosus versatur in generalibus." Untruthful witnesses, as well as unreflecting persons, commonly use words expressing complex ideas, and entangle facts with their own conclusions and inferences. The mode of detection here is to elicit by repeated questions what actually did take place, thus breaking up the complex idea into its component parts, and separating the facts from the inferences. Another form is that of "equivocation," or verbal truth-telling. - a practice much resorted to by witnesses who are regardless of their oaths; as also by others, who delude themselves into the belief that deception in this shape is, in a religious and moral point of view, either not criminal, or criminal in a less degree than actual falsehood. Of this form the commonest is the answer. "I might have done," to the direct question, "Did you?" - an answer tantamount to an admission.

The maxim, "Falsus in uno, falsus in omnibus," may be pushed too far. Not all the untrue testimony given in courts of justice proceeds from an intention to misstate or deceive. On the contrary, it most usually arises from interest or bias in favor of one party, which exercises on the minds of the witnesses an influence of which they are unconscious, and leads them to give distorted accounts of the matters to which they depose. Again, some witnesses have a way of compounding with their consciences,—they will not state positive falsehood, but will conceal the truth, or keep back a portion of it; while others, whose principles are sound, and whose testimony is true in the main, will lie deliberately when questioned on particular subjects, especially on some of a peculiar and delicate nature. The mode of extracting truth by cross-examination is, however, pretty much the same in all cases; namely, by questioning about matters which lie at a distance, and then show-

ing the falsehood of the direct testimony by comparing it with the facts elicited.

Menacing language and austerity of demeanor are not the most efficacious weapons for overcoming adverse witnesses. For, although there are cases in which they may be employed with advantage, still in the vast majority of instances a mendacious, an untruthful, or an evasive witness is far more effectually dealt with by keeping him in good humor with himself, and putting him off his guard with respect to the designs of his interrogator. Here, and indeed in examinations ex adverso in general, the great art is to conceal especially from the witness the object with which the interrogator's questions are put. One mode of accomplishing this is by questioning the witness on indifferent matters, in order, by diverting his attention, to cause him to forget the answer which it is desired to make him contradict.

But if cross-examination is a powerful engine, it is likewise an extremely dangerous one, very apt to recoil even on those who know how to use it. The young advocate should reflect that, if the transaction to which a witness speaks really occurred, so constant is the operation of the natural sanction of truth, that he is almost sure to recollect every material circumstance by which it was accompanied; and the more his memory is probed on the subject, the more of these circumstances will come to light, thus corroborating instead of shaking his testimony. And forgetfulness on the part of witnesses of immaterial circumstances not likely to attract attention, or even slight discrepancies in their testimonies respecting them, so far from impeaching their credit, often rather confirm it. Nothing can be more suspicious than a long story, told by a number of witnesses, who agree down to the minutest details. Hence it is a wellknown rule, that a cross-examining advocate ought not, in general, to ask questions the answers to which, if unfavorable, will be conclusive against him, as, for instance, in a case turning on identity, whether the witness is sure, or will swear, that the accused is the man of whom he is speaking. The judicious course is to question him as to surrounding, or even remote matters; his answers respecting which may show that, in the

testimony he gave in the first instance, he either spoke falsely, or was mistaken.

A witness who, either from self-importance, a desire to benefit the cause of the opposite party, or any other reason, displays a loquacious propensity, should be encouraged to talk, in order that he may either fall into some contradiction, or let drop something that may be serviceable to the party interrogating.

The course of cross-examination to be pursued in each particular cause should be subordinate to the plan which the advocate has formed in his mind for the conduct of it. Writers on the art of war, to which forensic battles have so often been compared, lay down as a principle, that every campaign should be conducted with some definite object in view; or, as they express it, that no army should be without its line of operation. There is, however, this difference, that the line of operation of an army can seldom be changed after fighting has begun, whereas matters transpiring in the course of a trial frequently disclose grounds of attack or defence imperceptible at its outset; the seizing on which, and adapting them to the actual state of things, requires that "ingenio veloci ac mobili, animo præsenti et acri." which Quintilian pronounces so essential to an advocate.

The faculty of interrogating witnesses with effect is unquestionably one of the arcana of the legal profession, and, in most instances at least, can only be attained after years of forensic experience. Cross-examination, or examination ex adverso, is the most effective of all means for extracting truth; much perjured testimony is prevented by the dread of it. In direct examination, although mediocrity is more easily attainable, it may be a question whether the highest degree of excellence is not even still more rare. For it requires mental powers of no inferior order so to interrogate each witness, whether learned or unlearned, intelligent or dull, matter of fact or imaginative, single-minded or designing, as to bring his story before the tribunal in the most natural, comprehensible, and effective form.

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